

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

April 8, 2010

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

PSF No.:08MD-052
MAUI

Napili Kai, Ltd. Request to Waive Payment Requirement for Grant of Term, Non-Exclusive Easement to Napili Kai, Ltd. for Walkway and Landscaping Purposes, Kaanapali, Maui, Tax Map Keys: (2) 4-3-2:seaward of 26, 27, 28

BACKGROUND:

The Board at its September 26, 2008 meeting, under agenda item D-7, approved staff's recommendation to authorize the issuance of a 65-year, term, non-exclusive easement to Napili Kai, Ltd ("Napili Kai"). for the right, privilege and authority to use, maintain, repair, replace and remove existing walkway, stairs, shower station, concrete pier block remnants and landscaping over, under and across State-owned land, hereinafter referred to as the "encroachment". Briefly, Napili Kai is planning to enlarge and improve its existing swimming pool, and has been required by the County of Maui to obtain a certified shoreline from the Department as part of the Special Management Area Use Permit process. During the shoreline survey, Napili Kai's land surveyor discovered the encroachment.

By letter dated May 1, 2006, OCCL, based on the information available, notes that the walkway was built sometime between 1949 and 1975 as evidenced by historical aerial photography, after the establishment of the Conservation District in 1964 however it is not clear that the improvements were placed in the Conservation District (seaward of the shoreline) at the time of construction. As a consequence, the Department does not consider the subject encroachment a Conservation District violation and will not be asking for an after-the-fact Conservation District use Application to cure this matter. The letter further states: the removal of the walkway would have minimal beneficial impact on beach resources due to the limited size (5-6 feet wide) and the fact that a major structure is situated directly landward of the encroachment. Nevertheless, while the improvements may not have been situated in the Conservation District when constructed, they are located outside of Napili Kai's legal boundary on record and encroach into State land. The encroaching walkway and stairs serve as an integral part of the whole structure that provides safe (public) access along the shoreline and access to the restaurant.

Subsequently, the Board at its meeting of July 28, 2009, under agenda Item D-7, approved staff's recommendation to amend its prior approval by deleting any reference to tax map keys: (2) 4-2-2:seaward of 4, 5, 7. The reason for the Board revisiting the issue originated from Ms. Nancy Youngren, attorney for Napili Kai, who contacted Land Division in May 2009. Ms. Youngren cited several concerns, following the Applicant being notified by letter dated April 15, 2009, that the one-time consideration for the term, non-exclusive easement was \$118,000. At the July 28, 2009 meeting, the Board reviewed the following issues raised by Ms. Youngren:

1. Napili Kai, Ltd. is being asked to be responsible for encroachments not fronting their property.

Staff reviewed the survey map and checked with County of Maui, Real Property Tax Assessment. Tax map key: (2) 4-2-2:4 is owned by Napili Lani. Tax map key: (2) 4-2-2:5 is owned by Puna Point II. Tax map key: (2) 4-2-2:7 is owned by Puna Point I. Regretfully, during the shoreline certification process, our staff instructed Napili Kai, Ltd. and its private land surveyor to include the encroachments beyond Napili Kai, Ltd. boundaries. Land Divisions' encroachment practice is to have the property owner adjacent to the encroachment either remove the encroachment or obtain an easement from the Department. Therefore, only Easement A and B front the Napili Kai, Ltd. property. It is our understanding Napili Kai, Ltd. does not want to remove the encroachments. This section of the concrete walkway and landscaped area (Easement A and B) are deemed necessary.

2. Napili Kai, Ltd. has acted in good faith, relying on the September 22, 1967 letter, therefore the consideration should be waived for Easement A and B.

Staff reviewed the letter and past SMA correspondences provided by Ms. Youngren, and concur that, if the Department had maintenance and liability concerns, it had the opportunity to record the understanding. Staff could not determine the reason as to why an easement was not issued in this instance.

However, Staff reviewed the contents of Mr. Ferry's September 22, 1967 letter which mentions 'Tax Plat 4-2-02'. Staff believes and checked old tax records, this does not include tax map key: (2) 4-3-2:26, 27, 28 owned by Napili Kai, Ltd. Without a supporting map attached to the September 22, 1967, we can only rely on the obvious. The Department had granted permission to construct 'a footpath along the rocky shore shown on Tax Plat 4-2-02'. Staff's conclusion is further supported by research done by the Office of Conservation and Coastal Land (OCCL), as stated in its letter dated May 1, 2006 to Mr. Paul Mancini. Therefore, paying for the easement consideration still applies.

Ms. Youngren respectfully requested a waiver of consideration or at a minimum, a discounted consideration, based on the fact the encroaching walkway has historic approvals from the county, as evidenced by the 1986 letters. Ms. Youngren contended that those historic approvals are a de facto acknowledgment that an easement existed at the time. Therefore, according to Ms. Youngren, this is not a new easement but is a way of cleaning up the record, and Napili Kai should not have to pay the current appraised value of the easement (even as discounted for the disutility factor).

Staff reviewed the letter by Mr. Paul Mancini dated April 22, 1986 and the letter by Mr. Christopher Hart dated May 14, 1986. Mr. Mancini's letter and supporting documents note the existence of the walkway prior to January 1, 1970, the effective date of the Shoreline Setback law. Mr. Hart's letter granted an SMA Minor Permit for the nonconforming sidewalk (walkway), landward of the shoreline and for "any and all additional proposals for work seaward of the certified shoreline shall be submitted to the State of Hawaii Department of Land and Natural Resources for appropriate review and approval." Essentially, both letters confirm the existence of the non-conforming walkway.

Previously, a shoreline was certified on February 4, 1985. Napili Kai's shoreline was determined to be seaward of the non-conforming walkway. An earlier shoreline determination request was rejected on October 27, 1971 due to insufficient information. Staff notes that the shoreline certification administrative rules were established on December 10, 1988. Encroachments now have to be resolved prior to the Chairperson certifying the shoreline. When encroachments are discovered, Applicants have the opportunity to either remove the encroachment or obtain an easement from the State. Because we could find no evidence the Department authorized the construction of the walkway on State lands we believe there should be no exception or waiver. Therefore, staff concluded that the arguments and evidence provided by Ms Youngren were insufficient to waive consideration for the easement and that Napili Kai should be required to purchase the easement at fair market value, as approved by the Land Board on September 26, 2008.

As a result, the Board did affirmed its decision that Napili Kai shall be required to purchase the easement for the area seaward of parcels (2) 4-3-002:026, 027, 028 at the appraised fair market value in order to resolve the encroachment.

DISCUSSION:

In response to the Board's decision, on October 19, 2009, Ms. Youngren supplied the Department with several documents in order to further her position that consideration for this easement should be waived, which are attached as Exhibit "B". After review of these documents, staff concludes that the evidence offered is insufficient as to justify a waiver or further discount for the easement's consideration.

The documents offered by Ms. Youngren fail to establish an affirmative intent by the State to either convey an easement or approve of the encroachment. The letter dated August 16, 1971 is addressed to the Department. However, it does not specifically refer to the easement area in question, nor does it indicate any sort of approval by the Department for the encroachment. To assert that this letter is representative of an implied approval and voluntary relinquishment of the property interest by the State to extent claimed by Ms. Youngren is meritless, as the result would be anathema to the Statute of Frauds.

In addition, none of the other correspondences provided are from the Department, only the County of Maui and private parties. Even if Napili Kai did rely on these as approvals for the encroachment, it is not reasonable by any means, as there is no indication, affirmative or implied, from the Department that it approved the encroachment. Regulatory approval for construction of an improvement from an appropriate permitting agency does not result in a transfer of property rights. The reliance on such third party correspondences amounts to nothing more than pure speculation. Accepting Napili Kai's claim of reliance would amount to the divestiture of public lands due to a mistake by a private party. Furthermore, the previous certified shorelines for the property cannot be construed as an approval of the encroachment or a divestiture of the State's property interests in the easement. Prior to 1988 the shoreline certification process was handled by the Department of Accounting & General Services (DAGS), Survey Division.

We could find no evidence indicating the Department contacted Napili Kai to resolve the encroachment. Clearly, we can say the 1967 letter is vague and could be misinterpreted and misused by anyone. Today such a letter would never be generated by the Department. Highly publicized deaths and lawsuits have resulted in the Department carefully evaluating liability exposure, maintenance responsibilities and a shrinking operating budget. We could find no evidence this 1967 permission was ever approved by the Land Board. Previous shoreline certifications cannot be relied upon as approval for the encroachment because the Survey Division did not perform any field checks for accuracy. Most importantly, at the time, the Department had no authority to resolve encroachments in the shoreline certification process. We could find no evidence a letter from the Department was sent to Napili Kai.

Past data was researched to ascertain the Board and Departments' policy towards shoreline easements. Shoreline easements cover: seawall, footings, concrete steps, overhang, rock revetment, boat ramp, walkways, showers, breakwater, etc. EXHIBIT "C". As an example of this, we point to Grant of Non-Exclusive Easement S-5668 issued in October 2003 to Evershine VIII, L.P. With permits from the Board of Harbor Commissioners in 1959, Henry J. Kaiser dredged a channel and turning basin seaward of his estate in Maunalua on State-owned submerged lands. A breakwater was constructed in 1960 and a surge break in 1962 with permits from State Department of Transportation, Harbors Division. Over the years, there was a succession of property owners. In 1999 the current owner requested permission

to repair the breakwater and dredge the harbor and channel citing the subject area was not conveyed to them, but owned by the State of Hawaii. Staff believed the owner should obtain an easement and be responsible for maintenance and liability. The improvements benefited the owner. This was approved by the Land Board at its meeting of November 16, 2001 (D-13). The one-time payment (consideration) for a 55-year non-exclusive easement was \$58,000.

Based on this, staff believes Napili Kai needs to obtain an easement from the State should be required to pay for the easement.

What has been past practice of the Land Board concerning encroachments?

- a) Fines were waived if the Applicant show proof the encroachment had government approval or was constructed prior to 1974, before the enactment of EIS laws.
- b) The Land Board at its meeting of June 28, 2002(D-17), attached as Exhibit "D", established criteria for imposing fines for encroachments under Section 171-6, HRS.
- c) Easement consideration waived for government agencies fulfilling their government mission.
- d) Easement considerations not waived for private citizens, regardless if encroachment occurred prior to 1974 and only discovered in 2009.

The shoreline certification administrative rules were established on December 10, 1988. The Counties pushed for this change because of unauthorized construction within the Special Management Area by property owners and the State's certification process had no "teeth" – didn't force the property owner to either: remove the unauthorized structure or obtain permits and/or approvals from the State or County. Encroachments now have to be resolved prior to the Chairperson certifying the shoreline.

How many shoreline certifications were done prior to 1988? Probably over 400+ requests. We are guessing, there probably were unauthorized improvements that slipped through the review process. The certification is good for only 1 year. Therefore, after 1988 the property owner would have to resolve the unauthorized improvements to our satisfaction.

Finally, reliance on the certified shoreline as an approval of a structure is incorrect. The purpose of the certified shoreline is to determine the jurisdictional boundary between the State and County regulatory agencies. Even under the current administrative rules, if a current shoreline is certified that indicates an encroachment or a structure within the

shoreline area, it serves as an indication that the issue has been resolved. However, the certified shoreline does not serve as a regulatory approval in and of itself.

CONCLUSION:

Napili Kai, Ltd. has benefited from the use of State lands for some time. Essentially, without the walkway, their improvements would have been victim to high surf surges. Granted, visitors and locals have benefited because the shoreline area has been well maintained by Napili Kai, Ltd. Nevertheless, the improvements still encroach upon State land. The issue of the use of the authorized use of public lands is not mitigated by the circumstance that the encroachment provides some public benefit.

Historically, regardless if the previous or current owner had obtained State or County approvals or if a previous or current owner did the construction without authorization, the Land Board did require payment for the new easement.

Past errors or slip-ups do not absolve Napili Kai, Ltd. of the requirements under Hawaii Revised Statutes Chapter 171 and Hawaii Administrative Rules Chapter 13-222.

RECOMMENDATION: That the Board

1. Deny Napili Kai, Ltd. request to waive payment requirement for the term, non-exclusive easement.
2. Require Napili Kai, Ltd. to pay for the easement consideration for Easement A and B (\$68,108) within 30 days of this Land Board approval or remove the encroachments within 90 days.
3. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



Charlene E. Unoki
Assistant Administrator

APPROVED FOR SUBMITTAL:





Exhibit "A"

Prior Land Board Approvals

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

July 22, 2009

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

PSF No.: 08MD-052
MAUI

Amend Prior Board Action of September 26, 2008 (D-7), Grant of Term, Non-Exclusive Easement to Napili Kai, Ltd. for Walkway, Stairs, Shower Station, Concrete Pier block Remnants and Landscaping purposes, Kaanapali, Maui, Tax Map Keys: (2) 4-2-2:seaward of 4, 5, 7 and 4-3-2:seaward of 26, 27, 28

BACKGROUND:

The Land Board at its September 26, 2008 meeting, under agenda item D-7, approved staff's recommendation to authorize the issuance of a 65-year, term, non-exclusive easement to Napili Kai, Ltd. for the right, privilege and authority to use, maintain, repair, replace and remove existing walkway, stairs, shower station, concrete pier block remnants and landscaping over, under and across State-owned land. Briefly, Napili Kai, Ltd. is planning to enlarge and improve its existing swimming pool. The County of Maui requires a shoreline certification as part of the Special Management Area Use Permit process. The land surveyor discovered several encroachments. They include sections of a footpath, stairway, wall, concrete pier block remnants and landscaping.

By letter dated May 1, 2006, OCCL based on the information available notes that the walkway was built sometime between 1949 and 1975 as evidenced by historical aerial photography, after the establishment of the Conservation District in 1964 however it is not clear that the improvements were placed in the Conservation District (seaward of the shoreline) at the time of construction. As a consequence, the DLNR does not consider the subject encroachment a Conservation District violation and will not be asking for an after-the-fact Conservation District use Application to cure this matter. The letter further states: the removal of the walkway would have minimal beneficial impact on beach resources due to the limited size (5-6 feet wide) and the fact that a major structure is situated directly landward of the encroachment. The encroaching walkway and stairs serve as an integral part of the whole structure that provides safe (public) access along the shoreline and access to the restaurant.

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
July 22, 2009

REMARKS:

By letter dated April 15, 2009, the Applicant was notified the one-time consideration for the term, non-exclusive easement was \$118,000. In May 2009, Ms. Nancy Youngren, attorney for Napili Kai, Ltd. contacted Land Division citing several concerns.

1. Napili Kai, Ltd. is being asked to be responsible for encroachments not fronting their property.

Response: Staff reviewed the survey map and checked with County of Maui, Real Property Tax Assessment. Tax map key: (2) 4-2-2:4 is owned by Napili Lani. Tax map key: (2) 4-2-2:5 is owned by Puna Point II. Tax map key: (2) 4-2-2:7 is owned by Puna Point I. Regretfully, during the shoreline certification process, our staff instructed Napili Kai, Ltd. and its private land surveyor to include the encroachments beyond Napili Kai, Ltd. boundaries. Land Divisions' encroachment practice is to have the property owner adjacent to the encroachment either remove the encroachment or obtain an easement from the Department. Therefore, only Easement A and B front the Napili Kai, Ltd. property. It is our understanding Napili Kai, Ltd. does not want to remove the encroachments. This section of the concrete walkway and landscaped area (Easement A and B) are deemed necessary.

Our staff will have to contact the other property owners to resolve the encroachments fronting their properties.

This separation will allow Napili Kai, Ltd. to continue processing their SMA permit for their property.

2. Napili Kai, Ltd. has acted in good faith, relying on the September 22, 1967 letter, therefore the consideration should be waived for Easement A and B.

Response: Staff reviewed the letter and past SMA correspondences provided by Ms. Youngren, and concur that, if the Department had maintenance and liability concerns, it had the opportunity to record the understanding. We are uncertain why an easement was not issued in this instance.

Staff reviewed the contents of Mr. Ferry's September 22, 1967 letter which mentions 'Tax Plat 4-2-02'. Staff believes and checked old tax records, this does not include tax map key: (2) 4-3-2:26, 27, 28 owned by Napili Kai, Ltd. Without a supporting map attached to the September 22, 1967, we can only rely on the obvious. The Department had granted permission to construct 'a footpath along the rocky shore shown on Tax Plat 4-2-02'.

Our conclusion is further supported by research done by the Office of Conservation and Coastal Land (OCCL), as stated in its letter

dated May 1, 2006 to Mr. Paul Mancini. Therefore, paying for the easement consideration still applies.

In the matter of the other property owners' right to a waiver of the easement consideration, that will be addressed only when those dispositions are brought before the Land Board.

Ms. Youngren on behalf of Napili Kai, Ltd. respectfully requests a waiver of consideration or at a minimum, a discounted consideration, based on the fact the encroaching walkway has historic approvals from the county, as evidenced by the 1986 letters. Those historic approvals are a de facto acknowledgment that an easement existed at the time. Therefore, this is not a new easement but is a way of cleaning up the record, and Napili Kai should not have to pay the current appraised value of the easement (even as discounted for the disutility factor).

Staff reviewed Mr. Paul Mancini letter dated April 22, 1986 and Mr. Christopher Hart letter dated May 14, 1986. Mr. Mancini's letter and supporting documents note the existence of the walkway prior to January 1, 1970, the effective date of the Shoreline Setback law. Mr. Hart's letter granted an SMA Minor Permit for the nonconforming sidewalk (walkway), landward of the shoreline and for "any and all additional proposals for work seaward of the certified shoreline shall be submitted to the State of Hawaii Department of Land and Natural Resources for appropriate review and approval." Essentially, both letters confirm the existence of the non-conforming walkway.

Previously, a shoreline determination was approved on February 4, 1985. Napili Kai, Ltd. shoreline was determined to be seaward of the non-conforming walkway. An earlier shoreline determination request was rejected on October 27, 1971 due to insufficient information. Staff notes that the shoreline certification administrative rules were established on December 10, 1988. Encroachments now have to be resolved prior to the Chairperson certifying the shoreline. When encroachments are discovered, Applicants have the opportunity to either remove the encroachment or obtain an easement from the State. Because we could find no evidence the Department authorized the construction of the walkway on State lands we believe there should be no exception or waiver. The walkway is non-conforming. The consideration for the easement should be at fair market, as approved by the Land Board on September 26, 2008.

3. The independent real estate appraiser hired by the Department should have considered a greater discount because of the public's use.

Response: Based on the appraisal report submitted by PGP Valuation Inc. the consideration for Easement A = \$52,026 and Easement B =

\$16,082

In his appraisal report, the appraiser further states: "The disutility factor can range from 0% to 100% based upon the degree of encumbrance of an easement and is typically low for a non-obtrusive easement such as a non-exclusive, underground pipeline and high for an exclusive easement such as an electrical substation. Although the subject easements lie on public land adjacent to the private Napili Kai land, the shoreline walkway and beach shower facilities are not reserved for the exclusive use of the owners and guests of the Napili Kai. Instead, all of the shoreline walkway, the majority of which lie on private land owned by Napili Kai, are enjoyed by the general public as well as the owners and guests of the Napili Kai. If the subject easement areas were reserved exclusively for the use of the owners and guests of Napili Kai no disutility factor would be warranted. However, the subject easements remain public and the benefit of use remains to be enjoyed by all. Considering the public/private use of the subject easement, a disutility factor of 50% is applied."

Staff believes 50% is reasonable and consistent with other access easements issued by the Department.

Furthermore, easements are also subject to arbitration. We strongly recommend this be the method of resolution for Napili Kai, Ltd.

RECOMMENDATION:

That the Board amend its prior action of September 26, 2008, under agenda Item D-7, by:

1. Delete any reference to tax map keys: (2) 4-2-2:seaward of 4, 5, 7.
2. All terms and conditions listed in its September 26, 2008 approval to remain the same.

Respectfully Submitted,



Charlene E. Unoki
Assistant Administrator

APPROVED FOR SUBMITTAL:



Laura H. Thielen, Chairperson

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

September 26, 2008

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

PSF No.: 08MD-052

MAUI

Grant of Term, Non-Exclusive Easement to Napili Kai, Ltd.
for Walkway, Stairs, Shower Station, Concrete Pier Block
Remnants and Landscaping Purposes, Kaanapali, Maui, Tax Map
Key: (2) 4-2-2:seaward of 4, 5, 7 and 4-3-2:seaward of 26,
27, 28.

APPLICANT:

Napili Kai, Ltd., a Hawaii corporation whose business and mailing
address is 5900 Lower Honoapiilani Road, Lahaina, Maui, 96761.

LEGAL REFERENCE:

Section 171-13, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government land located seaward of Kaanapali, Lahaina,
Maui, identified by Tax Map Key: (2) 4-2-2:seaward of 4, 5, 7 and
4-3-2:seaward of 26, 27, 28, as shown on the attached map labeled
Exhibit A.

AREA:

4,022 square feet, more or less.

ZONING:

State Land Use District:	Urban
County of Maui CZO:	Multifamily

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State
Constitution: YES _____ NO X

CURRENT USE STATUS:

EXHIBIT "A"

D-7

September 26, 2008

Unencumbered with encroachments.

CHARACTER OF USE:

Right, privilege and authority to use, maintain, repair, replace and remove existing walkway, stairs, shower station, concrete pier block remnants and landscaping over, under and across State-owned land.

COMMENCEMENT DATE:

To be determined by the Chairperson.

CONSIDERATION:

One-time payment to be determined by independent or staff appraisal establishing fair market rent, subject to review and approval by the Chairperson.

EASEMENT TERM:

Sixty-five (65) years

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

During a recent site visit (January 24, 2006), Office of Conservation and Coastal Lands (OCCL) staff observed the subject concrete pier block remnants and determined it appeared to be built before 1974, prior to the enactment of the EIS law and this action is therefore exempt from Ch. 343.

DCCA VERIFICATION:

Place of business registration confirmed:	YES	<u>x</u>	NO	<u> </u>
Registered business name confirmed:	YES	<u>x</u>	NO	<u> </u>
Applicant in good standing confirmed:	YES	<u>x</u>	NO	<u> </u>

APPLICANT REQUIREMENTS:

Applicant shall be required to:

- 1) Pay for an appraisal to determine initial one-time payment; and
- 2) Provide survey maps and descriptions according to State DAGS standards and at Applicant's own cost.

REMARKS:

The Applicant is planning to enlarge and improve its existing swimming pool. The County of Maui requires a shoreline certification as part of the Special Management Area Use Permit process. The land surveyor discovered several encroachments. They include sections of a footpath, stairway, wall, concrete pier block

remnants and landscaping.

By letter dated May 1, 2006, OCCL based on the information available notes that the walkway was built sometime between 1949 and 1975 as evidenced by historical aerial photography, after the establishment of the Conservation District in 1964 however it is not clear that the improvements were placed in the Conservation District (seaward of the shoreline) at the time of construction. As a consequence, the DLNR does not consider the subject encroachment a Conservation District violation and will not be asking for an after-the-fact Conservation District use Application to cure this matter. The letter further states: the removal of the walkway would have minimal beneficial impact on beach resources due to the limited size (5-6 feet wide) and the fact that a major structure is situated directly landward of the encroachment. In addition, the applicant provided a letter approval dated Sept. 22, 1967 by BLNR Chairman Jim Perry that permits the construction of the walkway. Public access along the shoreline will be diminished if the subject encroachment is removed. The encroaching walkway and stairs serve as an integral part of the whole structure that provides safe (public) access along the shoreline and access to the restaurant. (Exhibit B)

In addition, the applicant has requested a non-exclusive easement over the area on which pier block remnants are located seaward of TMK (2)4-3-2: 27. The applicant proposes to keep the area containing the pier block remnants in its existing state. The OCCL, in its letter dated Oct. 16, 2007, noted that removal of these nonconforming structures (constructed in the 1950s) "would not affect the beach resource." The applicant request a non-exclusive easement over the land area containing the pier block remnants, which measures approximately 1,262 square feet in size.

Pursuant to the Board's action of June 28, 2002, under agenda item D-17 which established criteria for imposing fines for encroachments, staff is recommending a fine of \$500 as the subject encroachment is over 100 square feet.

Applicant has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

There are no pertinent issues or concerns.

RECOMMENDATION: That the Board:

1. Impose a \$500 fine for illegal encroachment, under Section 171-6(12).
2. Authorize the subject requests to be applicable in the event of a change in the ownership of the abutting parcel described as Tax Map Key: (2) 4-2-2:seaward of 4, 5, 7 and 4-3-2:seaward of 26, 27, 28, provided the succeeding owner has not had a lease, permit, easement or other disposition of State lands

terminated within the last five (5) years due to non-compliance with such terms and conditions.

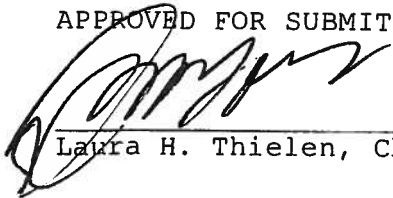
3. Subject to the Applicant fulfilling all of the Applicant requirements listed above, authorize the issuance of a term, non-exclusive easement to Napili Kai, Ltd. covering the subject area for walkway, stairs, shower station, concrete pier block remnants and landscaping purposes under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
 - A. The standard terms and conditions of the most current term shoreline encroachment easement document form, as may be amended from time to time;
 - B. The easement shall run with the land and shall inure to the benefit of the real property described as Tax Map Key: (2) 4-2-2:seaward of 4, 5, 7 and 4-3-2:seaward of 26, 27, 28, provided however: (1) it is specifically understood and agreed that the easement shall immediately cease to run with the land upon the expiration or other termination or abandonment of the easement; and (2) if and when the easement is sold, assigned, conveyed, or otherwise transferred, the Grantee shall notify the Grantee's successors or assigns of the insurance requirement in writing, separate and apart from this easement document;
 - C. Review and approval by the Department of the Attorney General; and
 - D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
 - E. Any shoreline hardening policy that may be adopted by the Board prior to execution of the grant of easement.

Respectfully Submitted,



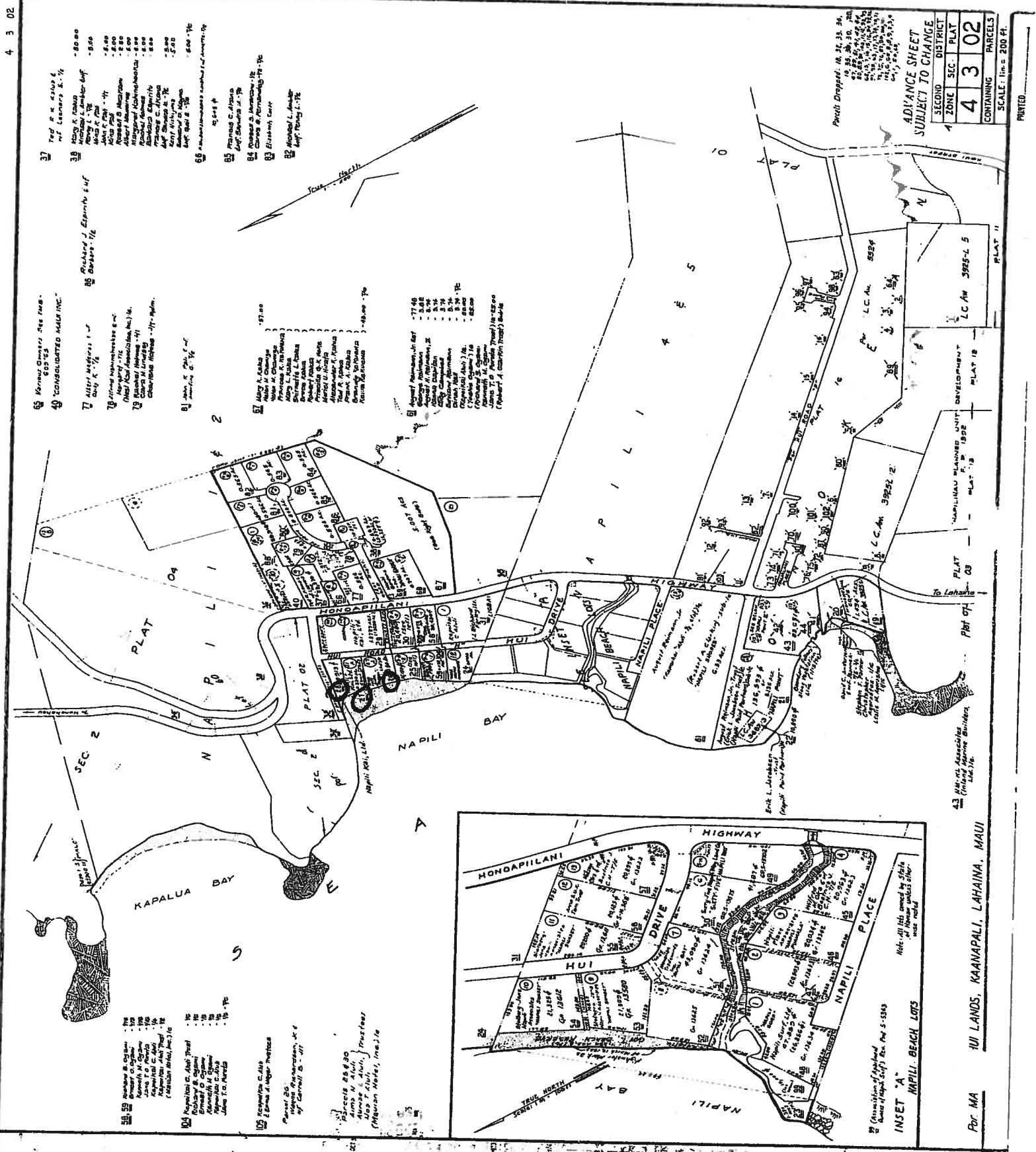
Charlene E. Unoki
Assistant Administrator

APPROVED FOR SUBMITTAL:



Laura H. Thielen, Chairperson





ADVANCE SHEET
SUBJECT TO CHANGE

SECTION	DISTRICT	PLAT	PARCELS
4	3	02	

SCALE: 1 inch = 200 ft.

PRINTED

For MA
HUI LANDS, KAAHAPALI, LAHAINA, MAUI

INSET NAPILI BEACH LOTS

Map of Napili Beach Lots showing lots 1 through 10. Note: All lots owned by State of Hawaii unless otherwise noted.

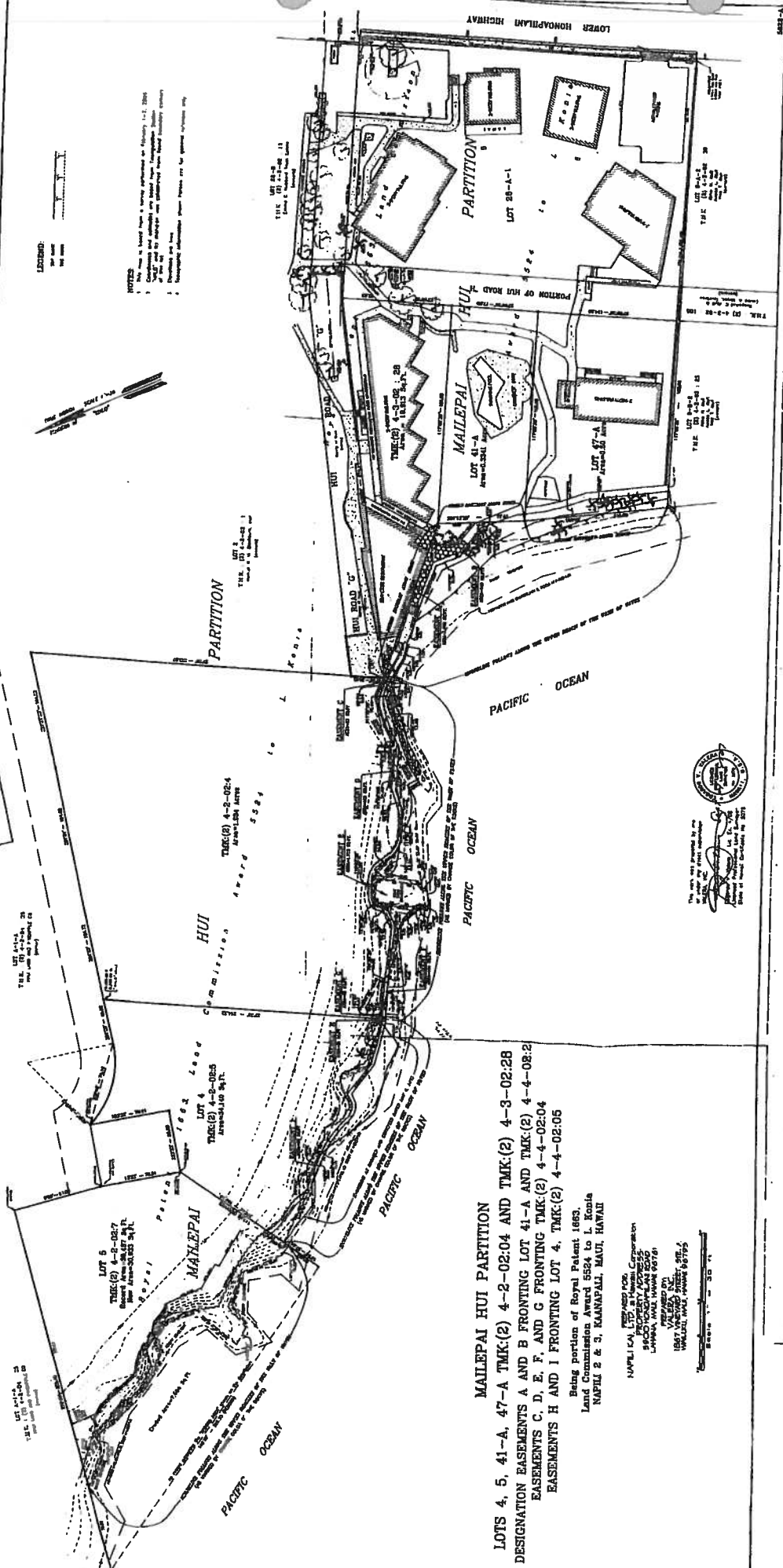
Map of Napili Beach Lots showing lots 11 through 20. Note: All lots owned by State of Hawaii unless otherwise noted.

Map of Napili Beach Lots showing lots 21 through 30. Note: All lots owned by State of Hawaii unless otherwise noted.

Map of Napili Beach Lots showing lots 31 through 40. Note: All lots owned by State of Hawaii unless otherwise noted.

Map of Napili Beach Lots showing lots 41 through 50. Note: All lots owned by State of Hawaii unless otherwise noted.

Map of Napili Beach Lots showing lots 51 through 60. Note: All lots owned by State of Hawaii unless otherwise noted.



LINDA LINGLE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

PETER T. YOUNG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
DEPUTY DIRECTOR - LAND

DEAN NAKANO
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

REF:OCCL:DE

May 1, 2006

Encroachment: MA-06-06

Mr. Paul Mancini
Mancini Welch & Geiger, LLP
C/O Napili Kai Beach Resort
33 Lono Ave. Suite 470A
Kahului, Hawaii 96732

Dear Mr. Mancini:

Subject: Shoreline Encroachment (Seawall) at the Napili Kai Beach Resort. Lahaina, Maui
TMK: (2) 4-3-002:028.

The Office of Conservation and Coastal Lands, Department of Land and Natural Resources (DLNR) has reviewed the submitted documentation, carried out a site visit January 24, 2006 and conducted related research to evaluate the environmental impact(s) of granting an easement for the subject encroachment. The encroachment in question is a concrete walkway, stairway and wall, located makai of the property line and within state-owned land and within the Conservation District (Figure 1).

The subject property is located in Napili, West Maui. A survey map by Valera, Inc based on a survey dated February 9, 2005 shows a 1,718 ft² portion of the walkway and stairs encroaching onto state land (Figure 2). This survey was not a state certified shoreline but delineates the improvements and the encroaching area. According to the information provided to the DLNR, it is believed the walkway is related to the construction of the Seahouse restaurant which was built in 1972.

The DLNR has determined that the basalt rock revetment to the north of the property is not related to the subject property and thus is not being considered as part of this assessment. Basalt rock fronting the Seahorse restaurant is considered naturally occurring and thus not an encroachment onto state lands. In addition, landscaped areas that were formerly mapped as encroachments have been remapped and the current request for easement is

EXHIBIT "B"

restricted to the concrete walkway, stairs and wall. The landscaped area located landward of the mapped encroaching walkway needs to be resolved the DLNR Land Division since it lies outside of the state Conservation District on unencumbered land (Figure 2).

The DLNR believes that information submitted regarding a BLNR 1967 approval letter for a walkway is related to the adjoining parcel TMK 4-2-2 and not the subject parcel TMK (4-3-2) as noted on the submitted letter (Figure 3). The DLNR has no record of any request for approval of a walkway or easement for the subject TMK. Further investigation reveals the walkway was built sometime between 1949 and 1975 as evidenced by historical aerial photography. There is evidence that the walkway was built sometime around 1972 in conjunction with the expansion of the Seahouse restaurant.

Based on the information available, it appears the improvements were initiated after the establishment of the Conservation District in 1964 however it is not clear that the improvements were placed in the Conservation District (seaward of the shoreline) at the time of construction. As a consequence, the DLNR does not consider the subject encroachment a Conservation District violation and will NOT be asking for an after-the-fact Conservation District Use Application to cure this matter.

The Board of Land and Natural Resource (BLNR) recently established a policy to allow the disposition of shoreline encroachments by either removal or issuance of an easement. In carrying-out this policy, the Department established criteria to guide decision-making over specific cases. The criteria are as follows:

1. Protect/preserve/enhance public shoreline access;
2. Protect/preserve/enhance public beach areas;
3. Protect adjacent properties;
4. Protect property and important facilities/structures from erosion damages; and
5. Apply "no tolerance" policy for recent or new unauthorized shoreline structures

In addition, the DLNR developed a "Shoreline Encroachment Information Sheet" that is intended to provide the DLNR with additional information to guide the Department's decisions on the disposition of shoreline encroachments. This form has been completed and submitted to the satisfaction of DLNR staff. Based on the information provided the DLNR has made the following determinations with regard to the subject improvements:

Surrounding Land Uses:

The surrounding uses are resort, commercial and public with a commercial restaurant immediately landward of the subject encroachment.

Beach Resources:

The beach resources are excellent. There is a high value recreational beach and exceptional water conditions and recreational opportunities.

Public Access:

There is direct public access along the shoreline at the site of the subject improvements. There is a public beach access walkway that provides lateral access along the coast that is the subject of this encroachment assessment.

Effect of Removing the Encroachment on:

Beach Resources: The removal of the walkway would have minimal beneficial impact on beach resources due to the limited size (5-6 ' wide) and the fact that a major structure is situated directly landward of the encroachment. The beach fronting the walkway appears slightly narrow possibly due to chronic or seasonal erosion at the north end. The DLNR has no evidence that the walkway actively interrupts or interferes with littoral process at this time, however it appears the beach system is attempting to migrate landward through wave forcing. The perceived benefits of removal of the walkway would be countered by the removal of well established public access along the shoreline. Since the walkway consists of only a small area and there is significant improvements immediately abutting it, removal of the walkway would not improve beach resources in any meaningful way unless the entire structure including the restaurant were considered for removal.

Public Access: Public access along the shoreline will be diminished if the subject encroachment is removed. The encroaching walkway and stairs serve as an integral part of the whole structure that provides safe (public) access along the shoreline and access to the restaurant.

Affect on Adjacent Properties: Removal of the improvements would have an unknown effect on the surrounding parcels. The effect of removing the subject improvements would reduce public access and not provide much gain in beach area. A vertical retaining wall (Seahouse restaurant wall) is situated directly landward of the walkway. Removal of the walkway and stairs would have an unknown effect on this structure. It is unknown what the design and structural engineering of the retaining wall is at this time but the walkway may play an important role in securing the retaining wall.

Upon review and careful consideration of the information gathered on this case, staff has determined that allowing the encroachments to remain through the issuance of an easement for the walkway and stairs would have minimal adverse impacts on natural resources, including beach resources and would provide for continued public access. **Therefore, the DLNR has no objections to an easement request being processed.**

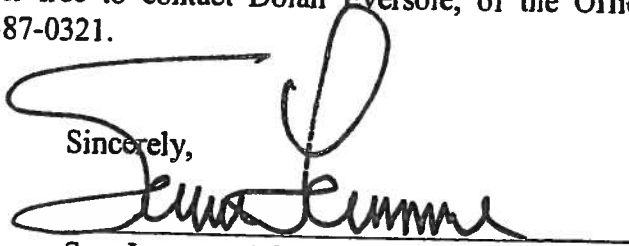
Pursuant to Chapter 171 Hawaii Administrative Rules (HAR), you are required to obtain a land disposition (normally a term easement in these cases) for the use of public lands, and you may be subject to a \$500 fine for the encroachment.

The landscaped area located landward of the mapped walkway may require a revocable permit (RP) from the DLNR Land Division since it lies outside of the state Conservation District on unencumbered land.

Please contact the DLNR, Land Division Maui District office at (808) 984-8103 regarding the processing of an easement and RP. If you do not pursue an easement, you will be required to remove the encroachment.

We hope this letter helps resolve some of the outstanding issues regarding this property. If you have any questions, please feel free to contact Dolan Eversole, of the Office of Conservation and Coastal Lands at 587-0321.

Sincerely,

A handwritten signature in black ink, appearing to read "Sam Lemmo", written over a horizontal line.

Sam Lemmo, Administrator
Office of Conservation and Coastal Lands

Cc: Maui Board Member

Maui Land Agent

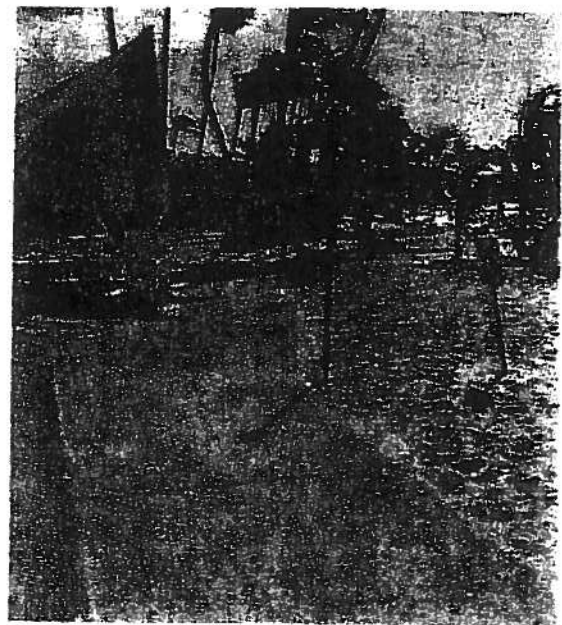
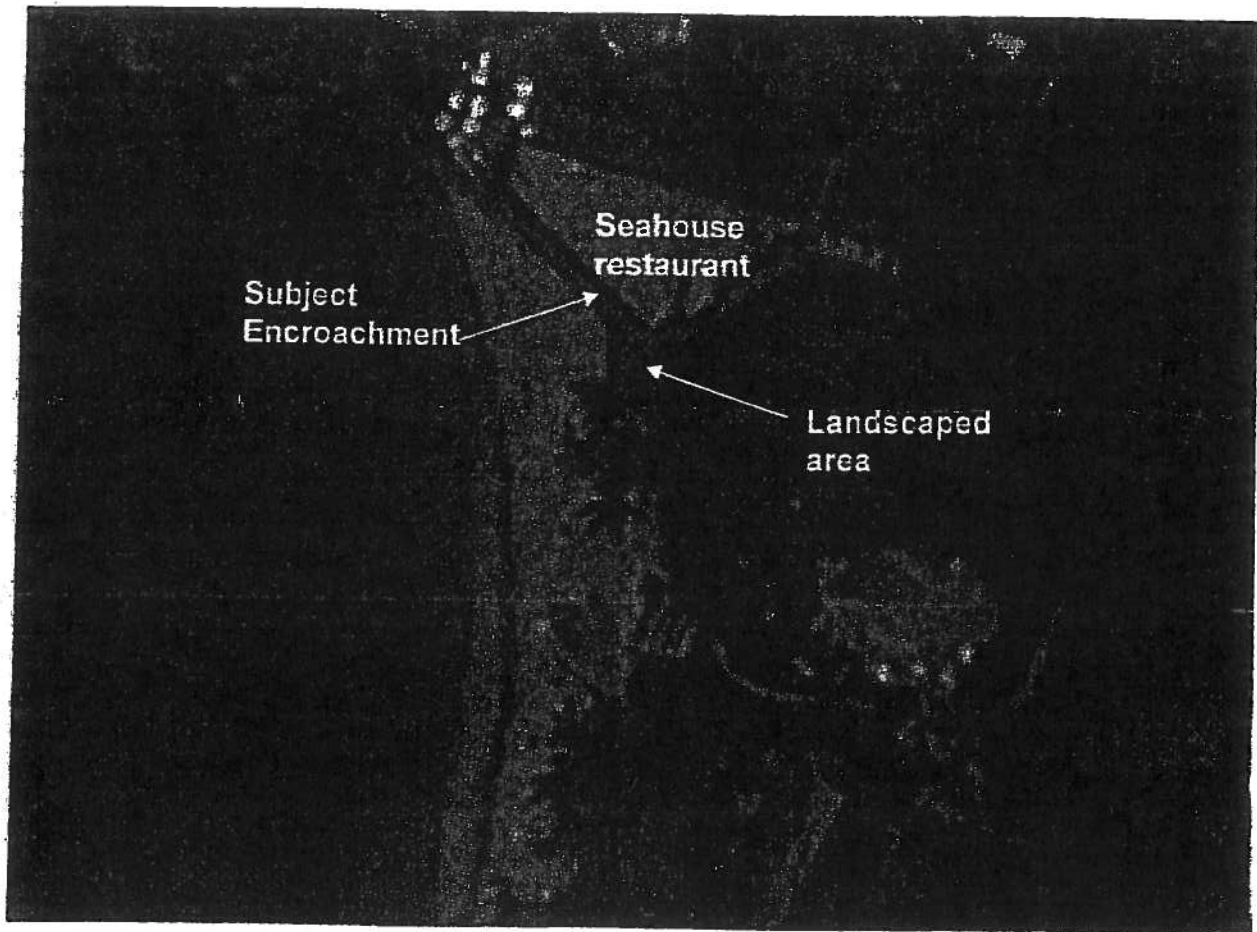
Land Division

Chairperson's Office

Maui County Planning Department- Thorne Abbott

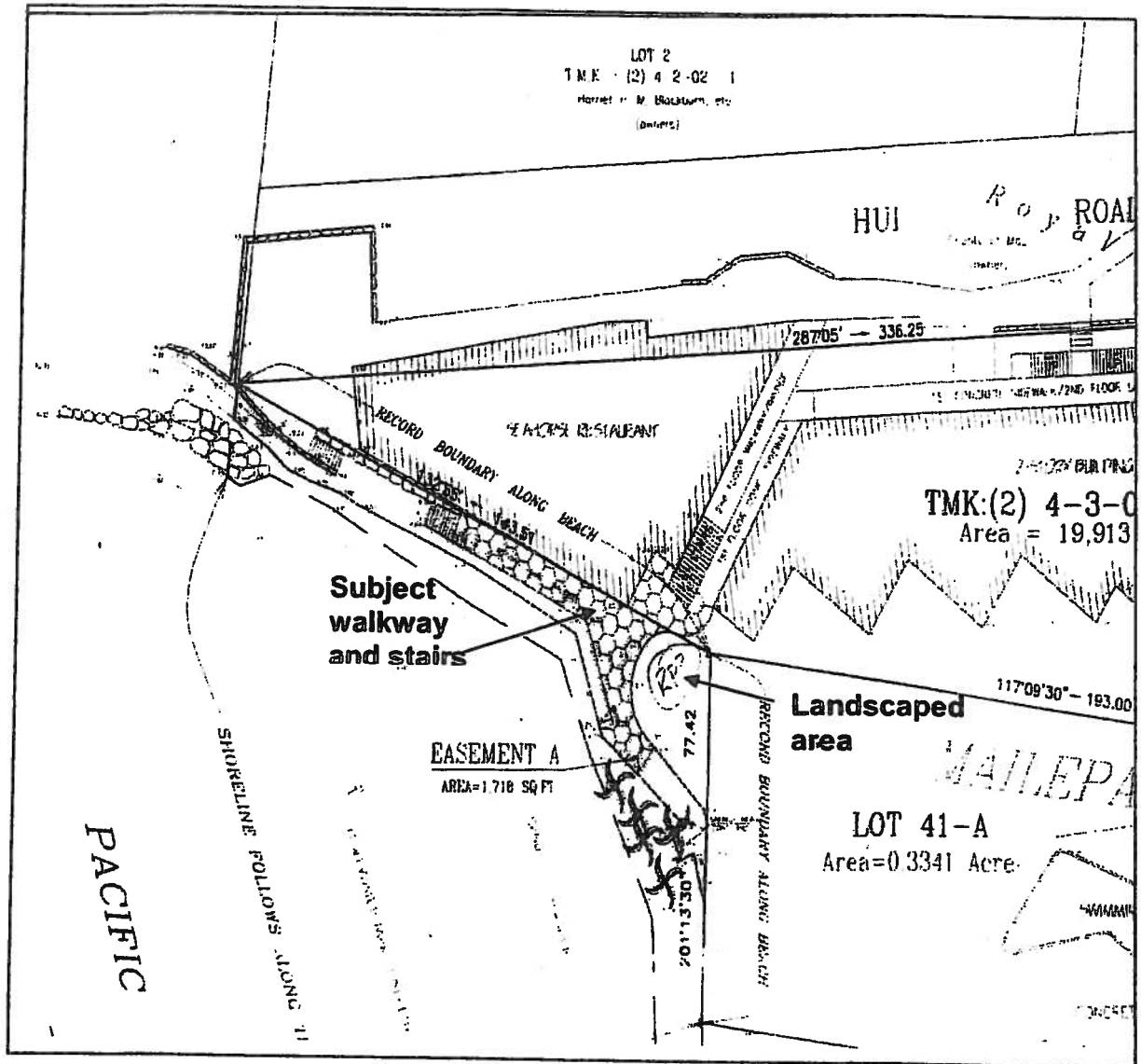
Andrew Nelson Frampton and Ward, LLC. 2073 Wells St. Ste 101 Wailuku, HI. 96793

Figure 1. Site Photographs



Shoreline Encroachment Napili Kai Beach Resort, Maui (2) -4-3-002:028.

Figure 2. Survey Map



Shoreline Encroachment Napili Kai Beach Resort, Maui (2) -4-3-002:028.

Figure 3. BLNR Letter

JOHN A. BURNS
GOVERNOR OF HAWAII



DIVISIONS:
CONVEYANCES
FISH AND GAME
FORESTRY
LAND MANAGEMENT
STATE PARKS
WATER AND LAND DEVELOPMENT

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
P. O. BOX 021
HONOLULU, HAWAII 96808

September 22, 1967


Mr. J. C. Millar
Napili Kai, Ltd.
R. R. #1
Lahaina, Maui, Hawaii

Dear Mr. Millar:

In response to your request to Mr. James Shaw, our Maui Agent, to make a footpath along the rocky shore shown on Tax Plat 4-2-02, we see no objections to your proposal. We are strongly in favor of working with land owners to enhance Hawaii's natural beauty. Accordingly, you may proceed with your proposal.

Very truly yours,

BOARD OF LAND AND NATURAL RESOURCES


JIM P. FERRY
Chairman and Member

cc: Mr. James Shaw
Mr. Tai Sung Yang

Shoreline Encroachment Napili Kai Beach Resort, Maui (2) -4-3-002:028.

5/1/86

CASE, KAY & LYNCH

ATTORNEYS AT LAW

Partnership Including Law Corporations

THE KAHULUI BUILDING
33 LONO AVENUE, SUITE 470
KAHULUI, MAUI, HAWAII 96732-1681
(808) 871-8351

151 NATIONWIDE PLAZA
4334 RICE STREET, SUITE 202
LAIE, KAUAI, HAWAII 96766-1388
(808) 243-4705

PONAHAWAI PROFESSIONAL CENTER
275 PONAHAWAI STREET, SUITE 201
HILO, HAWAII 96720-2028
(808) 951-6611

KUAKINI TOWER
75-5722 KUAKINI HIGHWAY, SUITE 203
KAILUA-KONA, HAWAII 96740-1733
(808) 329-4421

Mr. Millar,

The originals were
hand delivered to Chris
Hart today. A copy of
all was also delivered
to Robert Marez, Deputy
Prosecuting Attorney,
today as well. Louise

April 22, 1986



Mr. Christopher L. Hart
Planning Director
County of Maui
200 S. High Street
Wailuku, Maui, HI 96793

Re: Request Under April 7, 1986, Letter Concerning
Prohibitive Activities Within the Shoreline
Setback Area and Compliance on the Same

Dear Mr. Hart:

This is in response to your letter of April 7, 1986 wherein you ask that we submit an application to your office for a Special Management Area Assessment and a request for authorization for maintenance and repair work in the shoreline setback area, such requests relating to the events which led to the maintenance and repair of a certain concrete walkway in 1972.

Please find attached an affidavit of Mr. Jack Millar concerning the establishment of the beach walkway prior to the January 1, 1970, the effective date of the Shoreline Setback law. Also attached to Mr. Millar's affidavit are series of photographs and plans relating to existence of the beach walkway prior to January 1, 1970.

EXHIBIT "B"

Letter to Chris Hart
April 22, 1986
Page No. 2

Please also find attached our application for Minor SMA permit with regard to the beach walkway.

Also, please accept this letter as the request of Napili Kai Ltd. for your acknowledgment of the subject beach walkway as a structure which existed prior to January 1, 1970, and your further acknowledgment that the work performed by Napili Kai Ltd. pursuant to the plans dated March 10, 1972, concerned the repair and maintenance of the subject (nonconforming) structure.

Section 13(b) of the Shoreline Setback Rules and Regulations of the County of Maui states in part that:

"Any lawful conforming or structure existing within the shoreline setback on the effective date shall be permitted."

Section 13(d) of the Shoreline Setback Rules and Regulations of the County of Maui states in part that:

"Maintenance and repair work may be done on any nonconforming structure to keep it in sound condition, or to meet the minimum standards of applicable State and County requirements and regulations. A nonconforming structure may be reconstructed, provided that reconstruction of the structures destroyed by fire, flood, wind, earthquake, or other casualty, shall be started within a period of one (1) year from it's loss, and is diligently pursued to completion; provided further that the structure shall not be enlarged or changed to another nonconforming structure."

As indicated in the affidavit of Jack Millar, attached hereto, the subject beach walkway was a structure existing within the shoreline on the effective date the Shoreline Setback legislation and the 1972 maintenance and repair work on the structure was done in order to keep the structure in a safe and sound condition.

Letter to Chris Hart
April 22, 1986
Page No. 3

If any further documentation on our part is
necessary, please contact me immediately on the same.

Very truly yours,

CASE, KAY & LYNCH

Paul R. Mancini
Paul R. Mancini

PRM:lc/1437j
cc: Robert Maez
Jack Millar✓

OF Counsel:
CASE, KAY & LYNCH

PAUL R. MANCINI 1198-0
33 Lono Avenue, Suite 470
Kahului, Maui Hawaii 96732
Telephone No. (808) 871-8351

Attorney for Defendant

IN THE DISTRICT COURT OF THE SECOND CIRCUIT
LAHAINA DIVISION
STATE OF HAWAII

STATE OF HAWAII)	LC8: 2/21/86
)	
v.)	AFFIDAVIT OF JACK C. MILLAR;
)	EXHIBIT "A"
NAPILI KAI, LTD.)	
JACK C. MILLAR,)	
)	
Defendant.)	
<hr/>		
1438j)	

AFFIDAVIT OF JACK C. MILLAR

STATE OF HAWAII)
) SS.
COUNTY OF MAUI)

JACK C. MILLAR, being first duly sworn upon oath
deposes and says:

1. That he is President of Napili Kai, Ltd., and has
been president of Napili Kai, Ltd. since September 16, 1960;

2. As President of Napili Kai, Ltd. affiant planned,
supervised and oversaw the construction of a certain rock and

cement walkway (presently existing on Napili Kai Ltd. property and shown on Exhibit "A" attached to this affidavit), said construction took place sometime prior to 1963;

3. That in 1972 affiant planned and supervised the construction of the Napili Kai Ltd. restaurant which included certain repair and maintenance work to accessory facilities;

4. That as part of the construction of said restaurant, the referenced rock and cement walkway was to be maintained and repaired; the rock and cement walkway had suffered from erosion and flood damage and had undergone various maintenance and repair after its initial construction (approximately 1963) and was in need of maintenance and repair in 1972;

5. The rock and cement walkway was repaired in 1972 as part of the restaurant construction by pouring cement over the existing walkway and canterlieving the walkway from the adjacent retaining wall. After the completion of the 1972 work the County of Maui granted a certificate of occupancy, and certified that all work was completed in compliance with approved plans and specifications;

6. Affiant and affiant's consultants concluded in 1972 that such maintenance and repair was necessary to keep the rock and cement walkway in a sound condition and to meet reasonable safety standards concerning the same;

7. Apparently, in 1972, upon the review of the plans for Napili Kai restaurant, the Department of Public Works noted the construction work for the repair and maintenance of the concrete walkway and determined the same may require a shoreline setback variance. The notation on the 1972 plans was not communicated to the affiant or any of affiant's agents (to affiant's knowledge) or to affiant's contractor. Affiant became aware of the same in 1985 when the violation notice was issued to Napili Kai Ltd.;

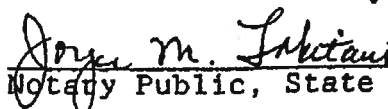
8. Affiant believes that the deletion of the walkway on the 1972 plans was a mistake by the County of Maui because the construction was mistakenly perceived to be new construction and not the repair and maintenance of the existing concrete walkway;

9. Affiant was never informed prior to 1985 that affiant was required to submit any additional documentation concerning the subject concrete walkway.

Further affiant sayeth naught.


JACK C. MILLAR

Subscribed and sworn to before me
this 25th day of April, 1986.


Notary Public, State of Hawaii

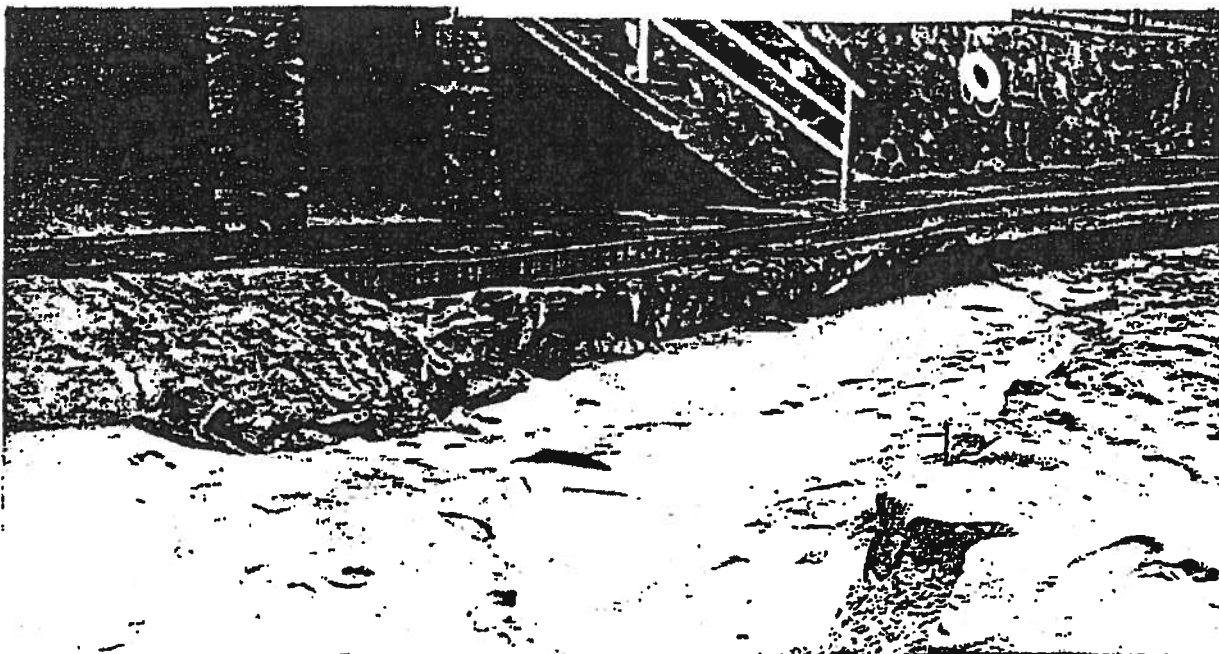
My Commission expires: 8/16/87



Sept '85

View shows old path... of rocks and cement under new concrete.

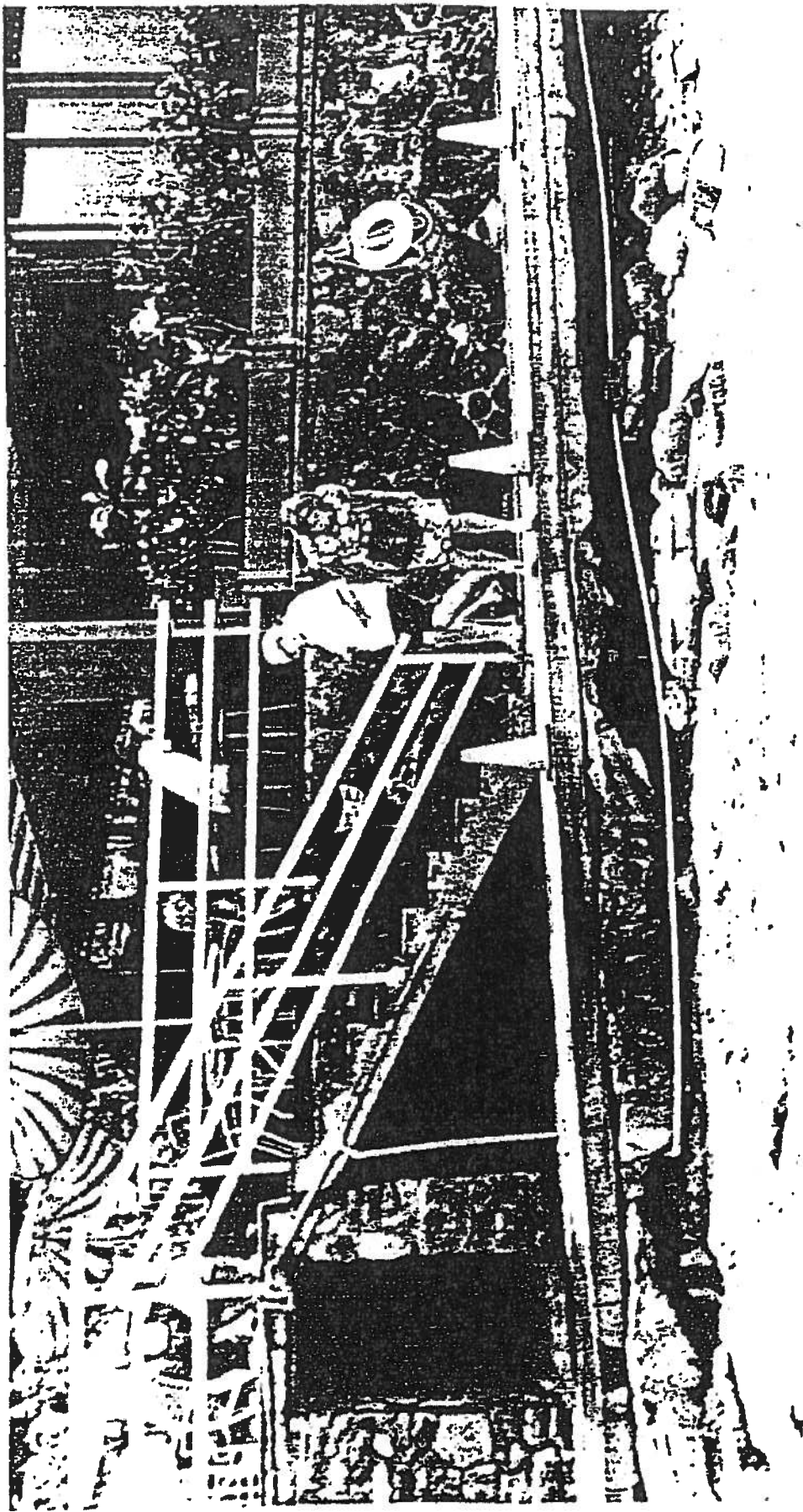
Note: sand above upper portion of path



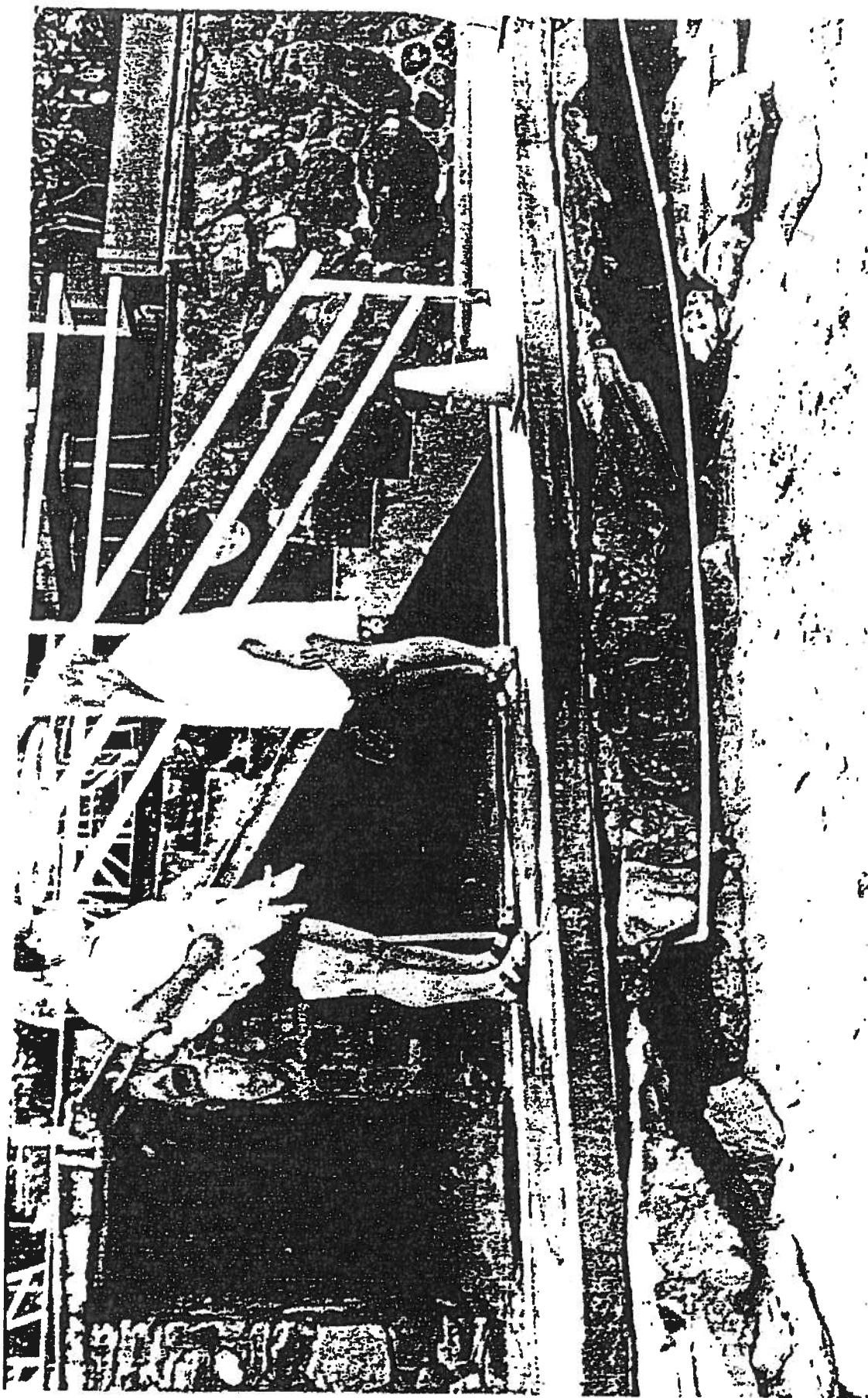
20 Mar 86

EXHIBIT "A"

View showing old path and connection to coastline path of

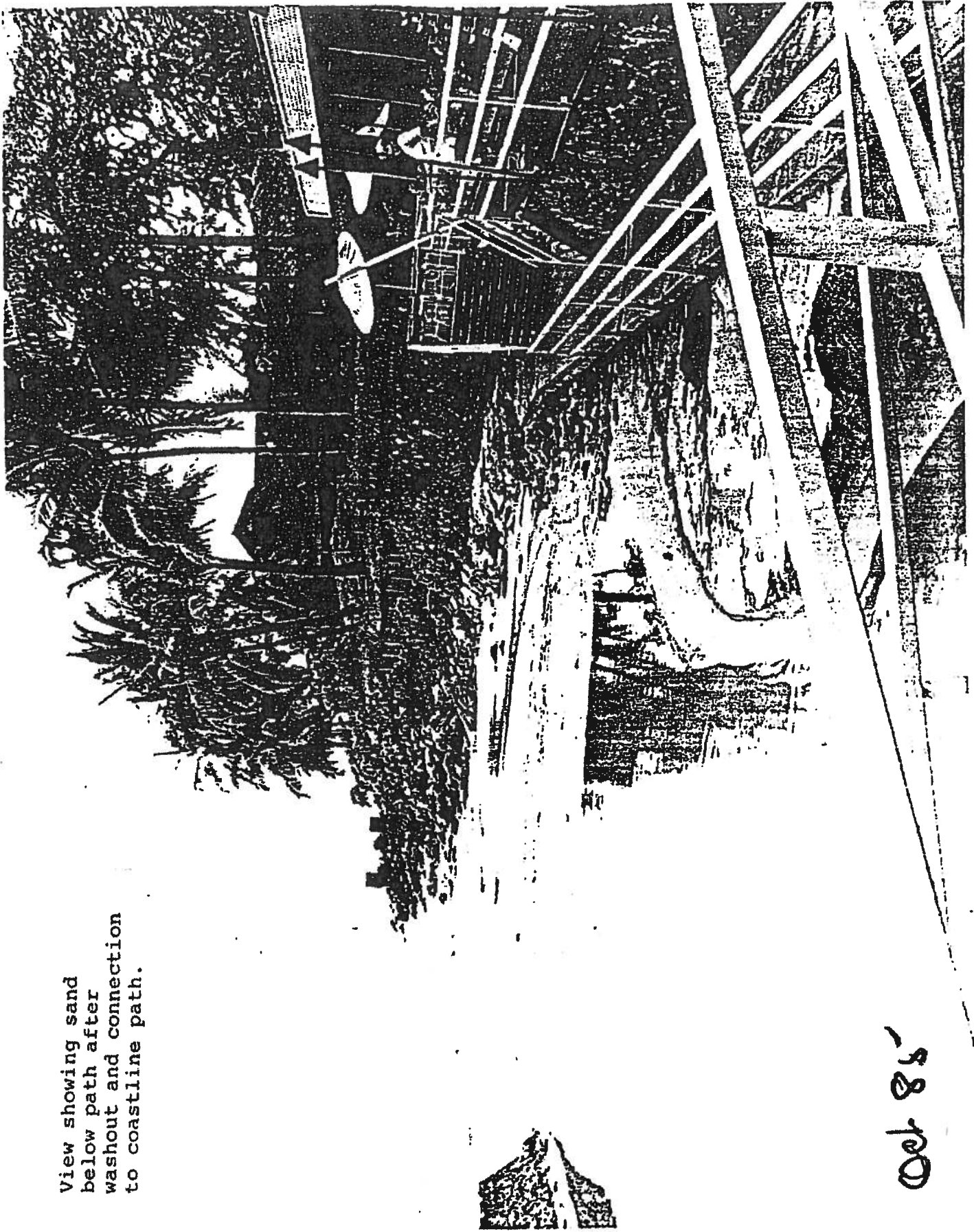


April '86

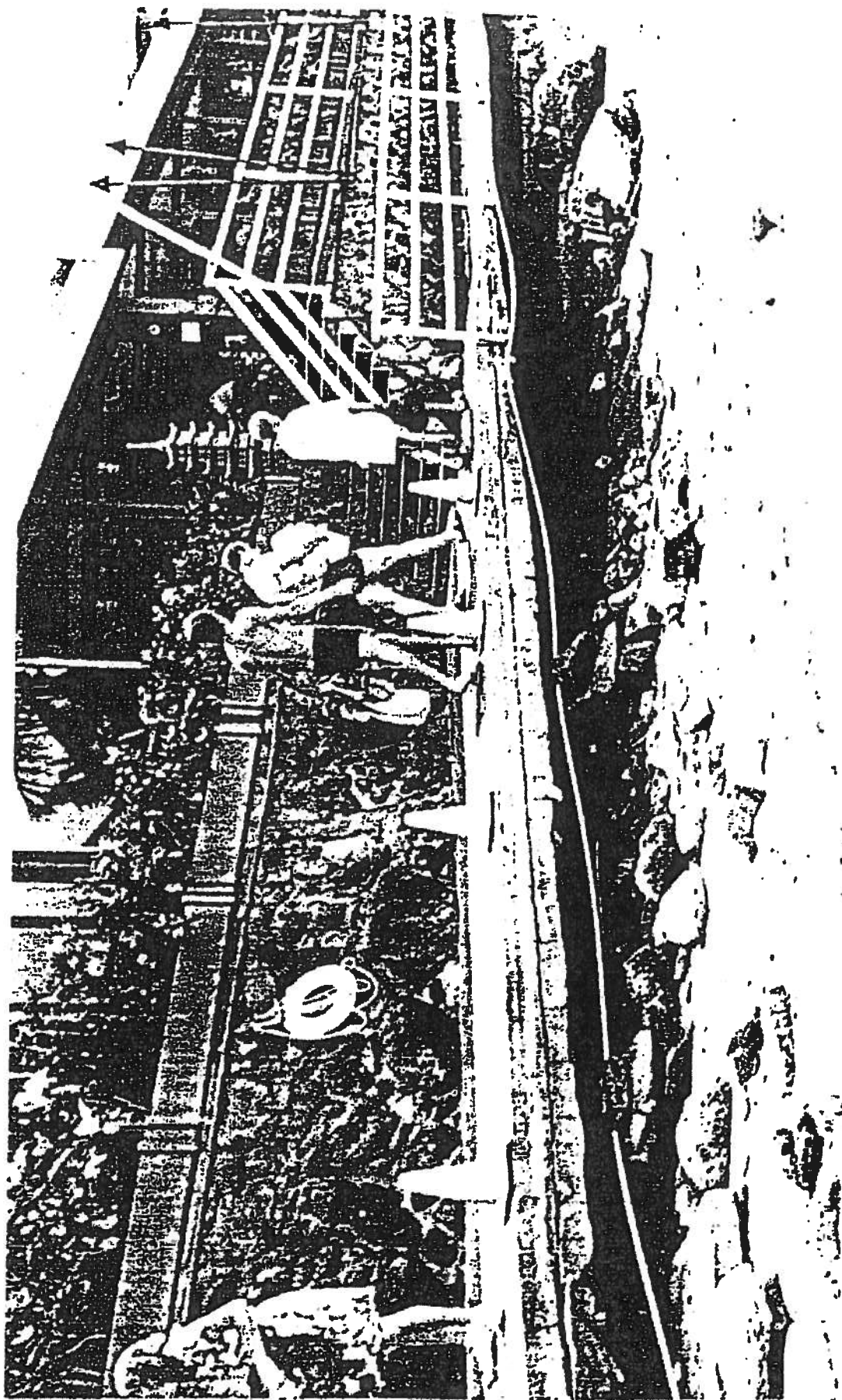


April '86

View showing sand
below path after
washout and connection
to coastline path.



Oct 85



April '86

END OF EXHIBIT "A"

Of Counsel:
CASE, KAY & LYNCH

PAUL R. MANCINI 1198-0
33 Lono Avenue, Suite 470
Kahului, Maui Hawaii 96732
Telephone No. (808) 871-8351
Attorney for Defendant

IN THE DISTRICT COURT OF THE SECOND CIRCUIT
LAHAINA DIVISION
STATE OF HAWAII

STATE OF HAWAII)	LC8: 2/21/86
)	
v.)	AFFIDAVIT OF TATSUMI IMADA
)	
NAPILI KAI, LTD.)	
JACK C. MILLAR,)	
)	
Defendant.)	
<hr/>		
1444j)	

AFFIDAVIT OF TATSUMI IMADA

STATE OF HAWAII)	
)	SS.
COUNTY OF MAUI)	

TATSUMI IMADA being first duly sworn upon oath deposes
and says:

1. That he is assistant manager of Norman Saito
Engineering of Wailuku, Maui, Hawaii;
2. That he is engineer of Napili Kai, Ltd.;

3. That affiant has reviewed the sketch for the repair to approximately 45' of the stone and concrete walkway prepared for Napili Kai, Ltd. in 1972 and that in his opinion the total cost of such work, assuming 1972 costs, would not exceed \$65,000.

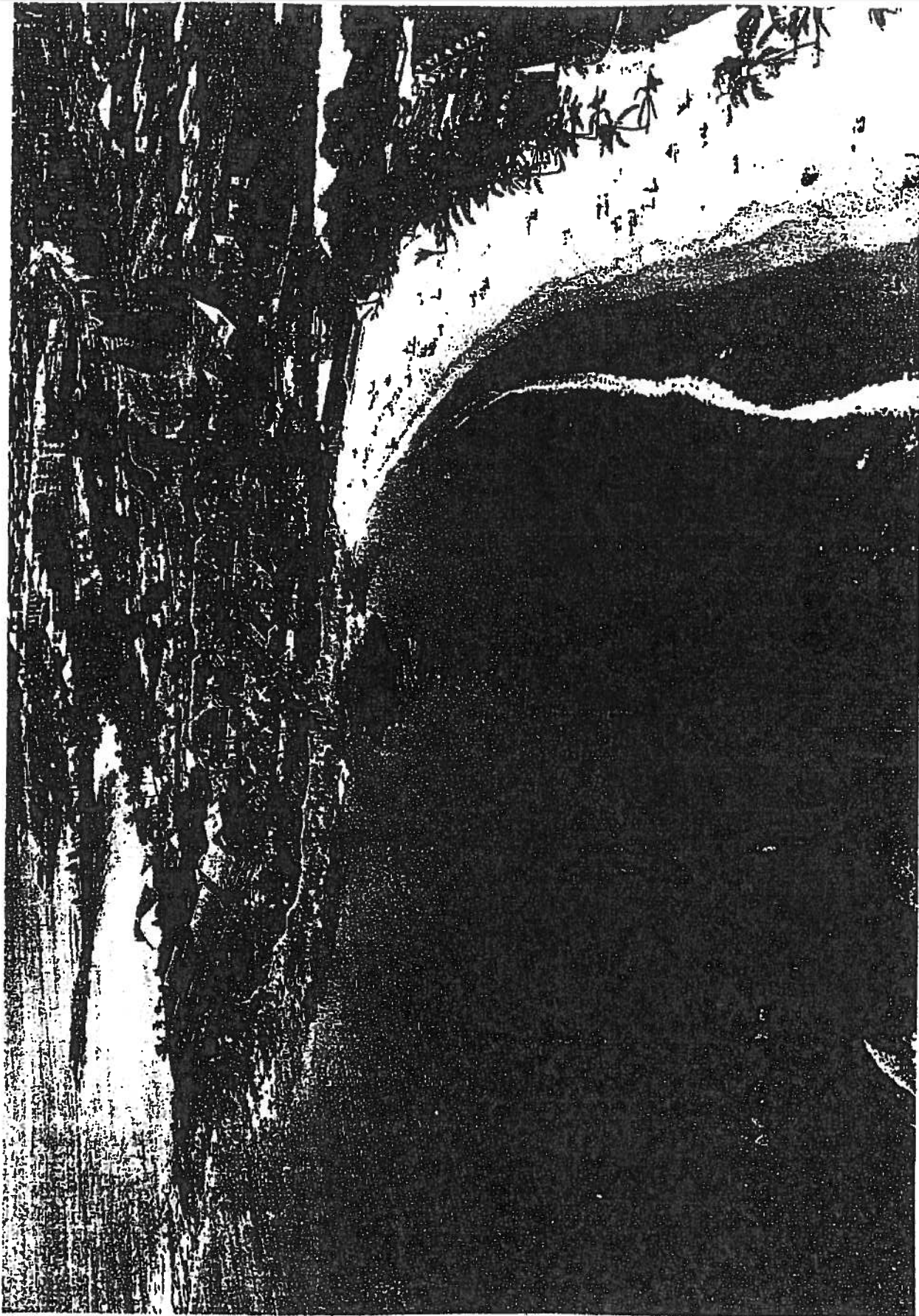
Further affiant sayeth naught.

Tatsumi Imada
TATSUMI IMADA

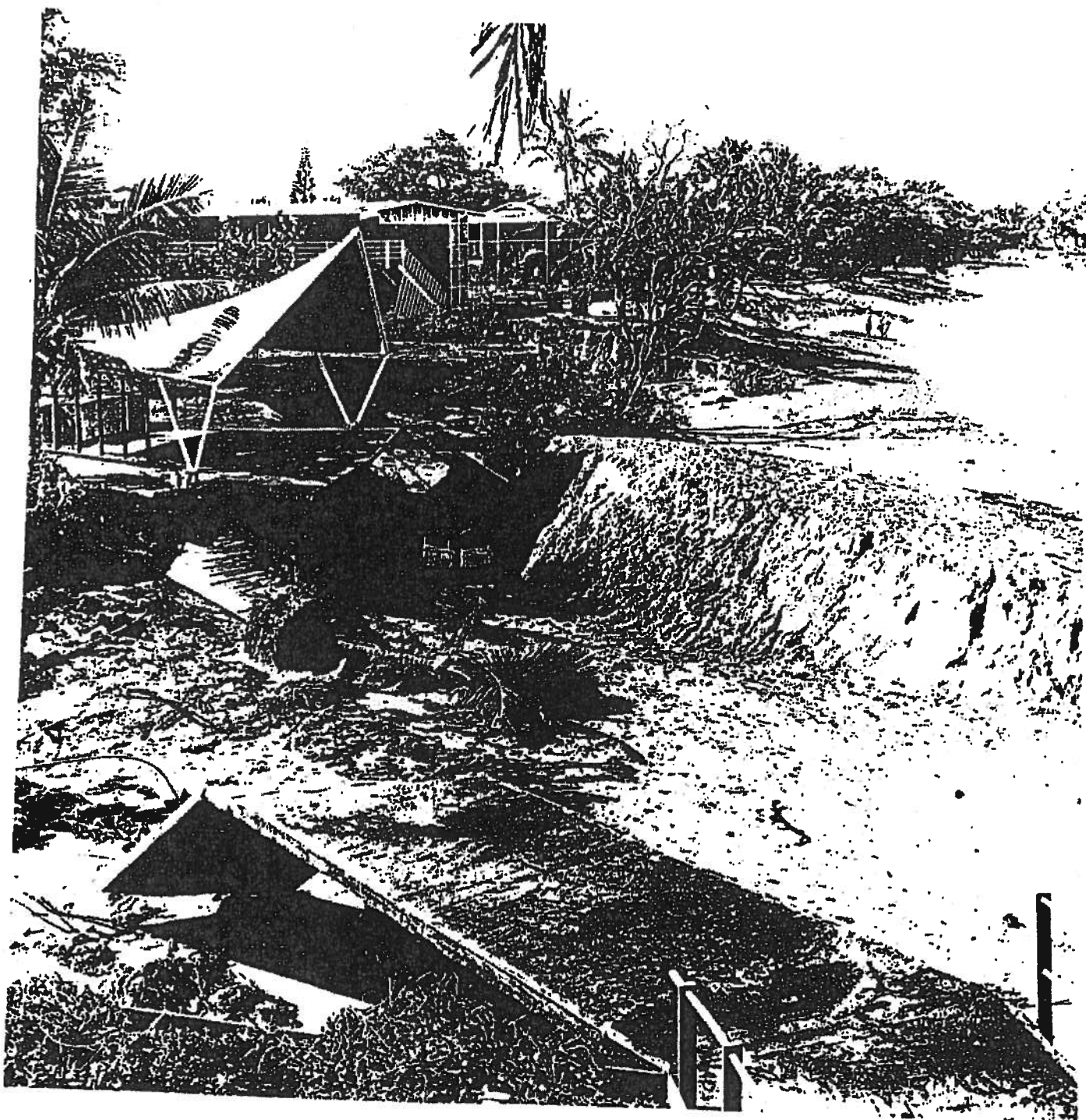
Subscribed and sworn to before me
this 1st day of May, 1986.

Joyce M. Takitani
Notary Public, State of Hawaii

My Commission expires: 8/16/87



View showing path
around the coastline.



View showing beach erosion from
run off water in 1964

MAUI PLANNING COMMISSION
David T. Fukuda, Chairman
Joseph C. Ventura, Vice Chairman
Toshi Ansai
Joseph Felipe
Joseph J. Franco
Rachael Jio
Roy Suda
Tom Sato
Susumu Sakaida
Vince Bagoyo, Jr., Ex-Officio
Alvin Fukunaga, Ex-Officio



MAY 16 1986

HANNIBAL TAVARES
Mayor

CHRISTOPHER L. HART
Planning Director

RALPH N. MASUDA
Deputy Planning Director

**COUNTY OF MAUI
PLANNING DEPARTMENT**

200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793

May 14, 1986

Mr. Paul Mancini
Attorney at Law
33 Lono Avenue, Suite 470
Kahului, HI 96732

Dear Mr. Mancini:

Re: Shoreline Setback Approval and Special Management Area
Assessment/Determination for the repair and maintenance
of an existing nonconforming sidewalk at the Napili Kai
Hotel at TMK 4-2-02:28, Napili, Maui.

In response to your letter dated April 30, 1986, requesting a
determination in accordance with the requirements of the SMA
Rules and Regulations of the County of Maui relative to the above
project, it is hereby determined that an SMA Minor Permit is
required for the following reasons:

1. Said project is a development;
2. Said project has a valuation not in excess of \$65,000.00;
3. Said project has no significant adverse environmental or
ecological effect, taking into account potential cumulative
effects; and
4. Said project is consistent with the objectives, policies, and
SMA guidelines set forth in the Hawaii Revised Statutes 205-A
and is consistent with the County General Plan and Zoning.

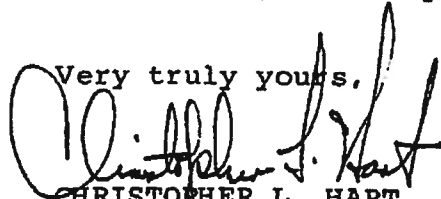
Furthermore, the nonconforming sidewalk is located within the
forty (40) ft. shoreline setback area and is therefore, subject
to the requirements of the Shoreline Setback Rules and
Regulations. Pursuant to Section 13(d) of said rules and
regulations, "Maintenance and repair work may be done on any
nonconforming structure to keep it in sound condition, or to meet
the minimum standards of applicable State and County requirements
and regulations. A nonconforming structure may be reconstructed,
provided that reconstruction of the structures destroyed by fire,
flood, wind, earthquake, or other casualty, shall be started
within a period of one (1) year from its loss, and is diligently
pursued to completion; provided further that the structure shall
not be enlarged or changed to another nonconforming structure."

Mr. Paul Mancini
May 14, 1986
Page 2

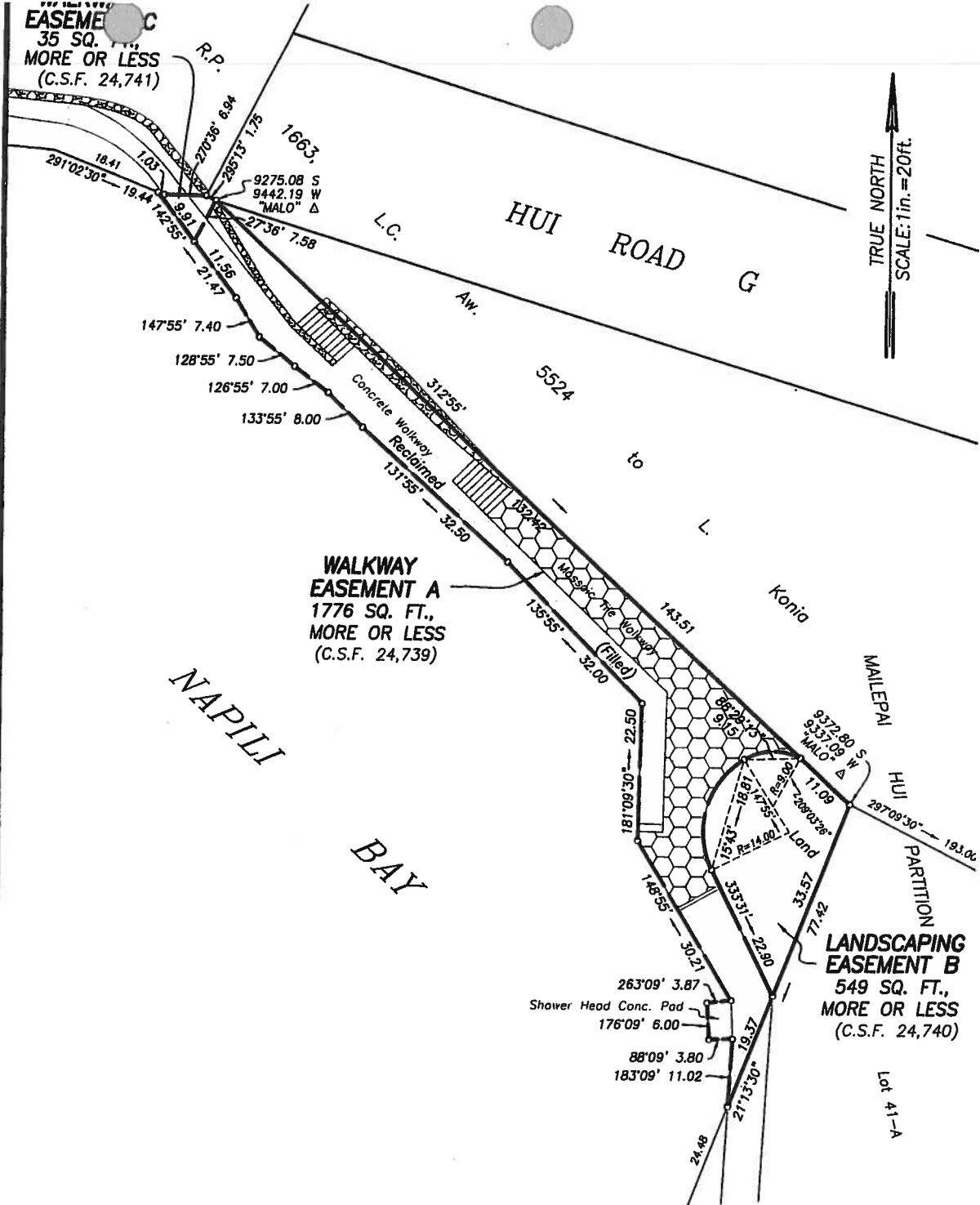
In consideration of the foregoing you are hereby granted an SMA Minor Permit approval and Shoreline Setback approval, subject to the following conditions:

1. That construction shall be limited to the maintenance and repair of the existing nonconforming sidewalk. Furthermore, said structure shall not be enlarged or changed to another nonconforming structure.
2. That the approval is only for work landward of the shoreline.
3. That any and all additional proposals for work seaward of the certified shoreline shall be submitted to the State of Hawaii Department of Land and Natural Resources for appropriate review and approval.
4. That no construction, operation of equipment, storage of materials, excavation or deposition of soil or other material shall occur seaward of the aforementioned shoreline.
5. That all other Federal, State and County requirements shall be met.

Thank you for your cooperation. If additional clarification is required please contact Ms. Colleen Suyama of my office.

Very truly yours,

CHRISTOPHER L. HART
Planning Director

CS:wc
cc: LUCA - Building
LUCA - CZM
DLNR - Eddie Ansai
Robert Maez - Deputy Prosecuting Attorney
Colleen Suyama



NON-EXCLUSIVE WALKWAY EASEMENTS A AND C AND

NON-EXCLUSIVE LANDSCAPING EASEMENT B

Fronting Mailepai Hui Partition

Napili 2 and 3, Lahaina, Maui, Hawaii

JOB Ma-366(08)

C. BK.

Scale: 1 inch = 20 feet

TAX MAP 4-2-02 : Seaward of 4 and
4-3-02 : Seaward of 27 & 28

SURVEY DIVISION
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
STATE OF HAWAII

C.S.F. NOS. 24,739 24,740
24,741

JGL November 12, 2008

EXHIBIT "C"

Exhibit "B"

Submitted by Nancy Youngren



"Nancy Youngren"
<NYoungren@caselombardi.
com>

10/19/2009 11:53 AM

To <Charlene.E.Unoki@hawaii.gov>

cc "Gregg Nelson" <gm@napilikai.com>

bcc

Subject Napili Kai - information for tomorrow's call

Charlene,

We thought it would be useful to forward to you the attached documents and a summary of Napili Kai's position in respect of the consideration for Easement A, in advance of our conference call tomorrow.

We have already requested a waiver or reduced consideration for Easement A based on the 1986

correspondence already reviewed by DLNR and referenced in your July 22, 2009 memo. The correspondence shows that DLNR issued a shoreline setback approval and a SMA minor permit approval in respect of the walkway in 1986.

However you noted in your July 22, 2009 memo to the Board that because you could find no evidence the Department authorized the construction of the walkway on State lands, there should be no exception or waiver of fair market consideration.

While there may not be evidence the initial construction was authorized (recognizing that it was constructed prior to the shoreline setback law), it appears the walkway was approved by the state as early as 1967 and certainly by 1971-72.

See your memo regarding the September 22, 1967 letter, limiting its approval to TMK 4-2-02. While we acknowledge the letter references only that parcel (not presently owned by Napili Kai), additional documentation we reviewed suggests that the approval evidenced by the 1967 letter also applies to the subject area.

As a result, we respectfully request that you reconsider your position.

See the following attached correspondence:

1. Letter dated August 16, 1971
2. Topographic map dated Oct. 1970

The letter references construction in the location of then-presently existing structures with the exception of the footpath which was approved in 1967.

The map shows the planned construction was in the area of the restaurant and not further down the coast. This supports the argument that the 1967 approval of the footpath extended past TMK 4-2-02 and into NK territory, TMK 4-3-2-26, 27 and 28.

3. Letter dated January 30, 1985.

Jack Millar states that the footpath questioned by the state in 1985 connected TMK 4-3-2-26 to Puna Point and was approved in the 9-22-67 letter. The letter also references it being shown on a shoreline survey of August 4, 1971 and a Dept. of Public Works- approved map dated 6/7/72.

4. Letter dated March 4, 1985 with 3 attachments (labeled for this email A, B and C, described below)

Reference is to the beach walkway in front of the restaurant. In connection with the walkway it is described as connecting the footpath and a concrete walkway, and is shown on Dept [Public] Works maps in 1970 and 1972.

A - Letter dated February 8, 1985.

Included because it is referenced with other attachments in the March 4 letter.

B- Letter dated March 1, 1985

References an approved shoreline survey showing the sidewalk as of October 27, 1971

*

C - Sept 22, 1967 letter

*5. November 8, 1971 approval of shoreline survey.

This is included because your July 22, 2009 memo states that the October 27, 1971 shoreline determination was rejected. This is inconsistent with Jack Millar's March 1, 1985 letter attached as "B" above, but this November 8, 1971 letter clearly shows that by then there was an approved shoreline survey.

We can presume the sidewalk was shown on that approved map based on the earlier correspondence.

To sum up Napili Kai's position:

Napili Kai relied on state approvals for the walkway that is now described as Easement A. The walkway was approved perhaps as early as 1967 in connection with the extension of a shoreline footpath.

Notwithstanding the 1967 letter only references TMK 4-2-02, subsequent correspondence supports the position that the 1967 letter approved a walkway that included the beachfront walkway in the subject area.

The walkway was reportedly shown on various state and county approved maps in 1970, 1971 and/or 1972.

Napili Kai relied on these approvals and should not now be required to pay consideration for an easement.

If consideration is not waived, it should be based on 1972 dollars.

We offer this email and attached documents in the spirit of cooperation and appreciate your consideration.

For our conference call tomorrow, I will be standing by in my office at 547-5588.

Thank you,
Nancy

Nancy J. Youngren
Case Lombardi & Pettit
Pacific Guardian Center, Mauka Tower
737 Bishop Street, Suite 2600
Honolulu, HI 96813
(808) 547-5588
(808) 523-5573(fax)
E-mail: njy@caselombardi.com

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1042921_1_8-16-71 letter.PDF



1042918_1_topo map (10-70).PDF



1042916_1_11-8-71 letter.PDF



1042915_1_3-4-85 letter w_attachments.PDF



1042914_1_1-30-85 letter.PDF

August 16, 1971

Mr. James Shaw
State Land Agent
Dept. of Land & Natural
Resources
State of Hawaii
Wailuku, Maui 96793

Dear Mr. Shaw:

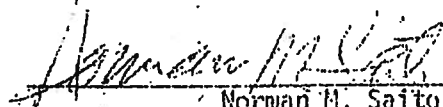
We are forwarding to you at the request of Mr. Jack Millar of the Napili Kai Beach Club a map showing the survey of the shoreline of his property at Napili, Maui.

Shown on the map are both the high water mark and the approximate debris line.

The plans showing proposed construction, a copy of which is attached, indicate that construction will be essentially in the position of presently existing structures with the exception of a footpath, separate permission for which has already been obtained. A copy of a letter from the Board of Land and Natural Resources dated September 22, 1967 relevant to this footpath is attached.

If we can assist you further relative to this matter, please do not hesitate to let us know.

Very truly yours,


Norman M. Saito
Consulting Engineer

JMB:ah

Attachments



HARRY H. OLSON
ARCHITECT

6/14/57
COST \$150
A-2

TOPOGRAPHIC MAP

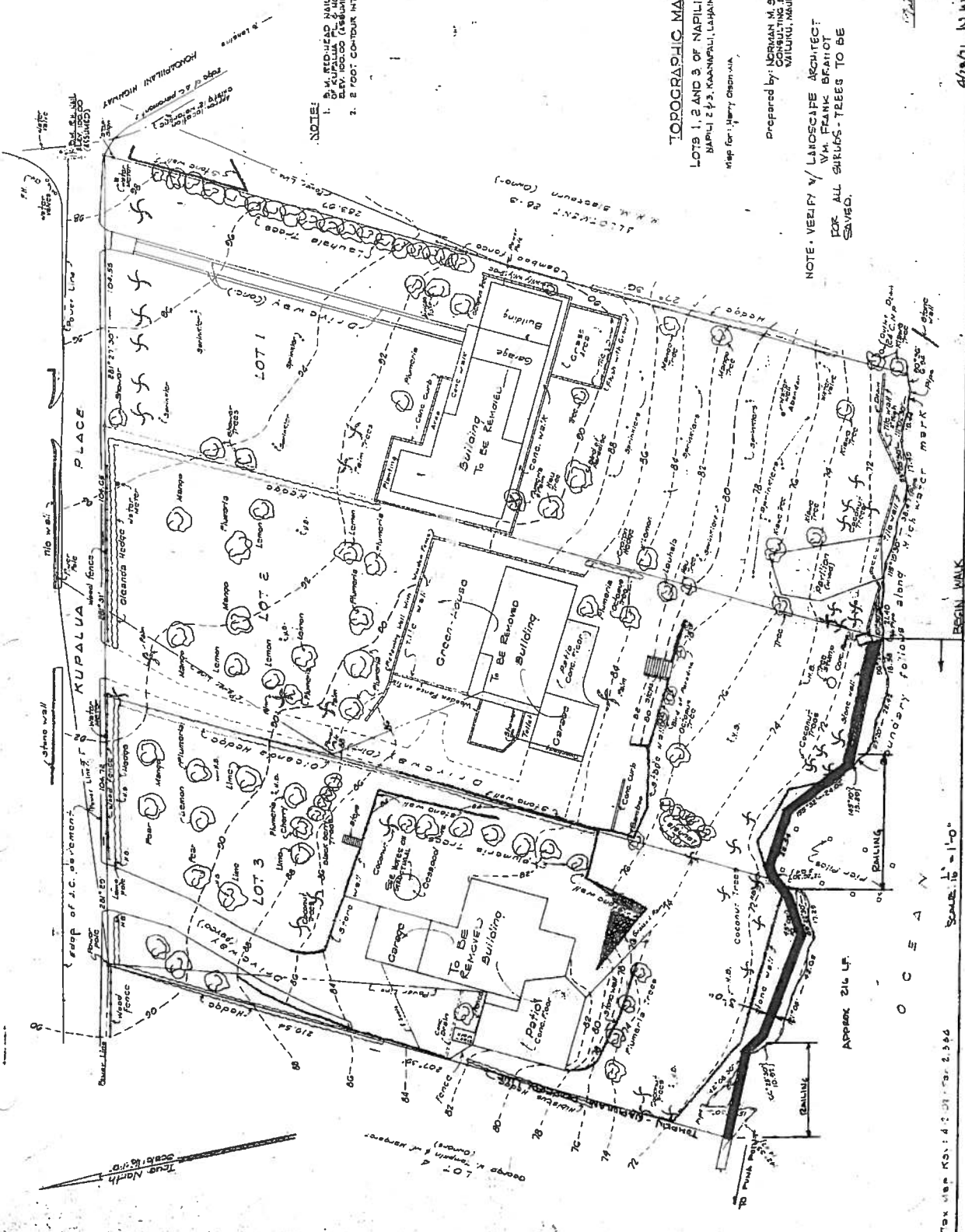
LOTS 1, 2 AND 3 OF NAPILI SUBDIVISION
NAPILI 2 & 3, KAHANAPI'OLI, LAHANA, MAUI, HAWAII
Map for: Harry Olson, Inc.
Scale: 1" = 100'
Date: June 4, 1957

Prepared by: VERMAN M. SATO
CONSULTING ENGINEER
WAILUKU, MAUI, HAWAII

NOTE: VERIFY V/LANDSCAPE ARCHITECT
V/M FRANK BRANTOT
FOR ALL SHRUBS - TREES TO BE
SAVED.

NOTE:

1. 2" REDUCED NAIL & INTERSECTION
CROSSING PAVEMENT (ASSUMED)
ELEV. 100.00 (ASSUMED)
2. 2' FOOT CONTOUR INTERVALS SHOWN



Scale: 1" = 100'

NAPILI KAI® BEACH CLUB

NAPILI BAY

ISLAND OF MAUI, HAWAII

30 January 1985

Land Use and Codes Administration
County of Maui
200 South High Street
Wailuku, HI 96793

Gentlemen:

Re: Notice of Violation dated 1/24/85

Further to my telephone conversation with Mr. Jeffrey de la Cruz, I am responding to the above notice.

In the conversation it was suggested that we had poured new concrete to make a different path along the beach inside the 40-foot set-back. Please be informed that we have made no construction of concrete or paths in this area since 1972 which was done from plans drawn by Architect Bradley & Wong, other than to make repairs to a riprap foot-path which is often washed out from run-offs of the big ditch behind our restaurant in an area of generally 4 feet in distance.

The establishment of this foot path connecting our property - Tax Map Key 4-3-2-26 - and thence along the shore to our property known as Puna Point, was approved by Jim P. Ferry, Chairman of the Board of Land and Natural Resources on September 22, 1967. It was clearly shown on the shoreline set-back survey of August 4, 1971 in an approved map by the Department of Public Works on 6/7/72.

This concrete foot-path was granted permission because of the extreme wash-outs from the Mauka side of the beach at this area and which we confined by a very substantial landing device in 1965 under the direction of Austin Smith & Associates which this path crosses over like a bridge. Recently our Maintenance Department installed a railing at the Makai edge of this path to prevent guests from falling into the great hole often caused by a heavy run-off tearing out the beach in this area - in the interest of further public safety.

As a result of the above mentioned research, we deny any wrong-doing as specified in the Notice.

We are surprised that such an abrupt Notice would be filed on us without any dialogue on the site with the principals of this Corporation.

Yours very truly,



Certified
R.R.R.

J. C. Millar
President and Managing
Director

MAILING ADDRESS: 5900 Honoapiilani Road, Lahaina, Hawaii 96761
TELEPHONE (808) 689-8271

TCM: JCR

CASE, KAY & LYNCH

ATTORNEYS AT LAW

A PARTNERSHIP INCLUDING LAW CORPORATIONS

GROSVENOR CENTER
MAUKA TOWER

TWENTY FIFTH AND TWENTY SIXTH FLOORS
737 BISHOP STREET
HONOLULU, HAWAII 96813

POST OFFICE BOX 494
HONOLULU, HAWAII 96809-0494
(808) 547-5400

March 4, 1985

DANIEL H. CASE*
ALAN C. RAY*
PAUL A. LYNCH*
GARY L. WICK*
JAMES H. CRIBLEY*
WESLEY W. ICHIDA*
JOHN R. HYRDAL*
MICHAEL L. BIEHL*
ROBERT E. ROWLAND*
DAVID W. PROUDFOOT*
BRUCE C. BIGELOW*
WILLIAM W. LYUEN*

ARTHUR F. ROCCA*
PAUL R. MANCINI*
ROBERT F. SCHNEIDER*
WARREN J. SCHNA*
DAVID H. LOUIE*
STEPHEN D. WHITTAKER*
SHARON A. MEKLE*
HARRY P. HENSHAW*
MICHAEL R. MARSH*
CHARLES W. COMBS*
DENNIS H. LOMBARD*
C. GEORGE SPNIKAS*

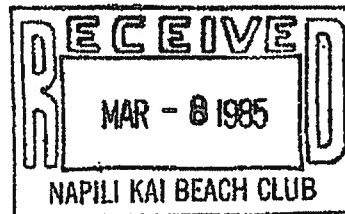
ERIC K. YAMAMOTO
DIANA VAN DE CAR
HARTWELL M. K. BLAKE
JEFFREY E. BRUNTON
ROSALYN LOONIS
DEAN D. CHOI
DANTON S. WONG
TOD Z. TANAKA
CATHY A. LEE
CATHERINE M. LESICA
L. MARK WU-OLSON

GREG H. NOJI
KEITH K. HIRAOKA
CANDACE MCCASLIN
B. REGINA ORECH
DAVID A. FELLER
MARK S. HILKER
NEAD KREK
SCOTT D. RADOVICH
PETER B. JAMES
CHARLES C. GOODIN

COUNSEL
GREGORY M. HANSEN*

OF COUNSEL
VERNON O. BORTZ ALLEN H. STACK
HORIYO KAWARAMI
*A LAW CORPORATION

Mr. Ralph Hayashi
Director
Department of Public Works
County of Maui
200 S. High Street
Wailuku, Maui, Hawaii 96793



Re: Notice of Violation to Napili Kai Beach Club
Dated January 24, 1985

Dear Mr. Hayashi:

Please find attached, correspondence from Planning Inspector, Jeff Dela Cruz, concerning a Notice of Violation against Napili Kai Beach Club dated January 24, 1985. Also attached for your reference is a response to Mr. Dela Cruz' letter from Mr. Jack Millar, President and Managing Director of Napili Kai Beach Club. Also enclosed is a September 22, 1967 letter from Mr. Jim P. Ferry, Chairman and member of the Board of Land and Natural Resources concerning the authorization of the footpath referenced in Mr. Dela Cruz' letter.

As I understand the attached correspondence, the Notice of Violation against Napili Kai Beach Club is based upon a position of the County of Maui that certain construction plans dated May 14, 1972, indicated that the beach walkway connecting a footpath and a concrete walkway would be deleted with the construction authorized under the construction plans. Mr. Dela Cruz, in his letter of February 8, 1985, states that construction of the beach walkway had been performed without the necessary government approvals. As I understand the letter, it is not the fact that the beach walkway was constructed without appropriate approval but that it was not deleted as was allegedly related in the May 14, 1972 plans.

FOUNDED 1888

W. O. SMITH (1848-1929)
C. DUDLEY PRATT (1800-1970)

STATE SAVINGS PLAZA
4334 RICE STREET, SUITE 202
LIHUE, KAUAI, HAWAII 96786-1388
(808) 245-4705

THE KAHULUI BUILDING
33 LONG AVENUE, SUITE 470
KAHULUI, MAUI, HAWAII 96732-1661
(808) 871-8351

AMERICAN SAVINGS BUILDING
100 PAUHAH STREET, SUITE 207
HILO, HAWAII 96720-3056
(808) 981-0618

HONOLULU OFFICE
CABLE: LOID
TELEX: 723853
TELECOPIER: (808) 523-1920

Mr. Ralph Hayashi
March 4, 1985
Page 2

Mr. Millar has reviewed the various construction plans that he has on file and could locate no plans which indicated that the beach walkway would be deleted. Mr. Millar has no knowledge that such plans were ever submitted to the County of Maui and has never given any authority to anyone to do the same. Mr. Millar has indicated to me that the deletion of the beach walkway would create a certain risk to the guests of the hotel and that it would not be practical to delete the walkway.

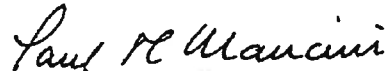
As related in the attached documents, Mr. Millar had asked in 1967 for authorization from the State to construct the footpath along the shoreline. The footpath is as shown on the maps approved by the Department Works in 1970 and 1972.

We would like a meeting between yourself and the appropriate officials of your department to review the situation. Our primary concern is to review with you the 1972 plans showing that the walkway would be deleted. We do not have a copy of such plans. In that it would not be in the public interest to remove the beach walkway, we would like to discuss the alternatives available to rectify the current situation.

My secretary will be calling you to set up a meeting that would be convenient with your schedule.

Very truly yours,

CASE, KAY & LYNCH



PAUL R. MANCINI

PRM:ls/0403j
cc: ✓ Mr. Jack Millar
Encls.

HANNIBAL TAVARES
Mayor

RALPH HAYASHI, P.E.
Director of Public Works

LESTER NAKASATO, P.E.
Deputy Director of Public Works

LOUIS ABREU
Superintendent of Highways

FRED ARAKI, P.E.
Engineering Chief

EDWIN KAGEHIRO, P.E.
Waste Management Chief

AARON SHINMOTO, P.E.
Land Use Administrator



COUNTY OF MAUI
DEPARTMENT OF PUBLIC WORKS

200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793



February 8, 1985

Napili Kai Beach Club
5900 Honoapiilani Road
Lahaina, Maui, HI 96761

Attention: J. C. Millar

Gentlemen:

Re: Notice of violation dated January 24, 1985.

Thank you for your letter dated January 30, 1985. The alleged violation is located north and adjacent to the concrete walkway of the restaurant.

The approved construction plans dated May 14, 1972 indicates that the beachwalk connecting the existing footpath and concrete walkway to be deleted. Therefore, the construction of the beachwalk has been done without the necessary government approvals.

In addition the alleged infraction has been observed by the Department of Land and Natural Resources (DLNR) State Land Surveyor and Deputy Attorney General.

Subsequently an inspection was conducted on January 23, 1985 to verify the existing condition.

Therefore, please be advised that failure to correct the alleged violation will result in the matter being forwarded to the Corporation Counsel for legal action.

If you have any questions, please call me at 244-7760.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jeff DeLa Cruz".

JEFF DELA CRUZ
Planning Inspector II

cc: Planning Department
DLNR

JD/rt

MAILING:

JOHN A. BURNS
GOVERNOR OF HAWAII



DIVISION 1
CONSERVATION
FISH AND GAME
FORESTRY
LAND MANAGEMENT
STATE PARKS
WATER AND LAND DEVELOPMENT

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
P. O. BOX 521
HONOLULU, HAWAII 96809

September 22, 1967

Mr. J. C. Millar
Napili Kai, Ltd.
R. R. #1
Lahaina, Maui, Hawaii

Dear Mr. Millar:

In response to your request to Mr. James Shaw, our Maui Agent, to make a footpath along the rocky shore shown on Tax Plat 4-2-02, we see no objections to your proposal. We are strongly in favor of working with land owners to enhance Hawaii's natural beauty. Accordingly, you may proceed with your proposal.

Very truly yours,

BOARD OF LAND AND NATURAL RESOURCES


JIM P. FERRY

Chairman and Member

cc: Mr. James Shaw
Mr. Tai Sung Yang

Job No. 12-2620-1

NOV 11 1971

November 8, 1971

Shoreline Determination
TNC: 4-3-02; Parcels 27 and 28
Kapili, Lahaina, Maui, Hawaii

Honorable Sunao Kido, Chairman
Department of Land and Natural
Resources
P. O. Box 621
Honolulu, Hawaii

Dear Sir:

Reference is made to your letter dated October 26, 1971 on the above-entitled subject matter.

The map prepared by Mr. Norman M. Saito, Land Surveyor showing the shoreline fronting Parcels 27 and 28 of Tax Map Key 4-3-66 located at Kapili, Lahaina, Maui, agrees with the State of Hawaii's interpretation of the shoreline.

Three (3) copies of the map that were certified by you are being transmitted to you for further disposition.

If we can be of further assistance on this matter, please do not hesitate to contact my Survey Division.

Very truly yours,

KAZUHI KIM
State Comptroller

Enclosures

KS:kgb

cc: J. Shaw, DLNR

w/(1)mup

Exhibit "C"

Shoreline Easements Issued by the Department

	OAHU	MAUI/MOLOKAI	HAWAII	KAUAI
1975				
1976				
1977				
1978				
1979				
1980				
1981				
1982				
1983			GL 4880 @ \$2168 one-time payment	
1984	GL 4914 @ \$2500 one-time payment			
1985				
1986			GL 5124 @ \$900/yr	
1987				
1988	GL 5163 @ \$1080/yr GL 5164 @ \$440/yr			
1989	GL 5172 @ \$237/yr GL 5174 @ \$3000/yr GL 5175 @ \$240/yr	GL 5182 @ \$3000/yr GL 5183 @ \$700/yr		
1990	GL 5195 @ \$150/yr GL 5196 @ \$150/yr GL 5199 @ \$9625 one-time payment GL 5200 @ \$5000 one-time payment			
1991		GL 5217 @ \$9350/yr	GL 5211 @ \$9680 one-time payment	

	OAHU	MAUI/MOLOKAI	HAWAII	KAUAI
1992			GL 5212 @ \$852 one-time payment	
1993	GL 5260 @ \$27370 one-time payment GL 5337 @ \$19530 one-time payment GL 5338 @ \$17496 one-time payment GL 5339 @ \$23412 one-time payment GL 5340 @ \$23310 one-time payment GL 5341 @ \$17640 one-time payment GL 5342 @ \$21180 one-time payment GL 5343 @ \$30846 one-time payment	GL 5252 @ \$5160/yr GL 5270 @ \$2900 one-time payment		
1994				
1995	GL 5389 @ \$810/yr			
1996				
1997				
1998				
1999				
2000	GL 5601 @ \$2100 one-time payment GL 5603 \$275 one-time payment			
2001			GL 5612 @ \$1785 one-time payment	

	OAHU	MAUI/MOLOKAI	HAWAII	KAUAI
			time payment	
2002			GL 5613 @ \$200/yr	
2003	GL 5610 @ \$50700 one-time payment GL 5632 @ \$740 one-time payment GL 5652 @ \$11290 one-time payment GL 5668 @ \$58000 one-time payment GL 5669 @ \$11300 one-time payment GL 5675 @ \$2406 one-time payment	GL 5647 @ \$4740 one-time payment		
2004	GL 5651 @ \$210 one-time payment GL 5680 @ \$250 one-time payment GL 5683 @ \$10600 one-time payment GL 5689 @ \$4210 one-time payment GL 5703 @ \$2440 one-time payment GL 5715 @ \$4700 one-time payment	GL 5639 @ \$2300 one-time payment	GL 5664 @ \$6700 one-time payment	
2005	GL 5609 @ \$20430 one-time payment GL 5627 @ \$7460 one-time payment		GL 5722 @ \$3900 one-time payment	

	OAHU	MAUI/MOLOKAI	HAWAII	KAUAI
	GL 5637 @ \$2161 one-time payment GL 5712 @ 8370 one-time payment GL 5720 @ \$500 one-time payment GL 5729 \$500 one-time payment GL 5739 @ \$12840 one-time payment GL 5744 @ \$5070 one-time payment GL 5831 @ \$14480 one-time payment GL 5834 @ \$1280 one-time payment GL 5840 @ \$3730 one-time payment			
2006	GL 5710 @ \$950 one-time payment GL 5802 @ \$3040 one-time payment GL 5818 @ \$3400 one-time payment GL 5820 @ \$500 one-time payment GL 5829 @ \$610 one-time payment GL 5843 @ \$5090 one-time payment GL 5846 @ \$1240 one-time payment	GL 5798 @ \$47000 one-time payment GL 5869 @ \$3150 one-time payment GL 5842 \$156 one-time payment	GL 5863 @ \$4370 one-time payment	

	OAHU	MAUI/MOLOKAI	HAWAII	KAUAI
	time payment GL 5849 @ \$1550 one- time payment GL 5857 @ \$11570 one- time payment GL 5896 @ \$8680 one- time payment			
2007	GL 5827 @ \$18260 one- time payment GL 5853 @ \$12800 one- time payment GL 5874 @ \$11530 one- time payment GL 5906 @ \$49700 one- time payment GL 5908 @ \$26890 one- time payment	GL 5835 @ \$17540 one- time payment	GL 5877 @ \$36/yr	
2008	GL 5838 @ \$500 one- time payment GL 5927 @ \$24550 one- time payment GL 5932 @ \$34140 one- time payment GL 5955 @ \$28030 one- time payment GL 5967 @ \$21570 one- time payment	GL 5830 @ \$2700 one- time payment		
2009	GL 5957 @ \$2360 one- time payment	GL 5968 @ \$135000 one- time payment		

	OAHU	MAUI/MOLOKAI	HAWAII	KAUAI
	GL 5960 @ \$3332/yr GL 5961 @ \$9032/yr GL 5969 @ \$65660 one- time payment GL 5970 @ \$23000 one- time payment GL 5973 @ \$39060 one- time payment GL 5979 @ \$27440 one- time payment			

Exhibit "D"

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

June 28, 2002

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

STATEWIDE

Criteria for Imposing Fine on Illegal Encroachments
Pursuant to Section 171-6(12), HRS

BACKGROUND:

On April 12, 2002, (Item D-27), when the Board considered a request for a non-exclusive term easement for seawall purposes, the Board directed staff to develop criteria on the imposing of fines for encroachments under Section 171-6, HRS, and that past Board actions on Kaneohe Bay encroachments should be reviewed for consistency with the criteria.

Pursuant to Section 171-6(12), HRS, the Board is authorized to:

- "(12) Bring such actions as may be necessary to remove or remedy encroachments upon public lands. Any person causing an encroachment upon public land shall be subject to a fine of not more than \$500 a day for the first offense and shall be liable for administrative costs incurred by the department and for payment of damages. Upon the second offense and thereafter, the violator shall (A) be fined not less than \$500 nor more than \$2,000 per day; (B) if required by the board, restore the land to its original condition if altered and assume the costs thereof; and (C) assume such costs as may result from adverse effects from such restoration;"

Encroachments are found in various situations, for example, when the abutting owner applies for a shoreline certification, when a pier owner submits the map for the lease document pursuant to the Kaneohe Bay Piers Amnesty Program or upon investigation of complaints. Encroachments can also be found in non-shoreline situation, e.g. partition wall between State and private parcels. While the shoreline encroachments are more common to be found, the following discussion applies to all types of encroachments onto public lands.

If the encroachment is along the shoreline, i.e. within conservation district, normal processing starts with obtaining comments from the Coastal Land Program staff (CLP). CLP staff reviews a

as amended
APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
June 28, 2002 *kek*

ITEM D-17

questionnaire completed by the applicant and determines what course of action is appropriate according to established criteria aimed at protecting beach resources and public access to those resources. Subject to CLP's review, staff will request Board approval for the issuance of a term non-exclusive easement covering the encroachment. Some of the encroachments may be exempted from filing a Conservation District Use Application because they existed legally prior to date (1964) of enactment of the Conservation District Land Use law. Historically, as a matter of practice, staff would recommend that the Board impose a fine of \$500 for encroachment onto public lands pursuant to Section 171-6(12), HRS.

For the Board's information, the Planning Branch has implemented a penalty schedule for the Hearing Office Administrative Penalty System (HOAPS) for violation of the Conservation District land use law. First, no shoreline structures built after August 27, 1999 (the date the Board adopted amendments to the Coastal Erosion Management Plan) will be processed through HOAPS. For all others, a maximum fine of \$500 will be imposed for any encroachment, regardless of size and date (before August 27, 1999), found in location where the beach resources are determined to be excellent or good. For areas in which the beach resources are determined to be fair or poor, a sliding scale according to the size and date of the encroachment is used. The Planning Branch uses the effective dates of October 1, 1964 (establishment of the Conservation District) and June 22, 1981 (establishment of Chapter 13-2, Hawaii Administrative Rules) for this sliding scale as follows:

- \$500 for more recent encroachments (June 22, 1981 – August 27, 1999) regardless of size
- \$100 for long-established encroachments (October 1, 1964 – June 22, 1981) but under 20 square feet
- \$250 for long-established encroachments (October 1, 1964 – June 22, 1981) over 20 but under 100 square feet
- \$500 for long-established encroachments (October 1, 1964 – June 22, 1981) over 100 square feet

REMARKS

Staff provides some common situations in the following paragraphs regarding the encroachments and our responses to each which result in a general guideline for staff to follow when recommending the amount of encroachment fines to the Board. All applicants subject to a fine may appeal to the Board to reduce or waive the fine recommended by staff.

Age of the Encroachment

Some applicants may claim that the encroachment has been in existence for a long time and no one ever told them that they are encroaching on State lands. Now, maybe due to their application for a shoreline certification, the State notifies them they have an encroachment which has to be resolved before the shoreline can be certified. Due to the lengthy existence of the encroachment, these owners may say they should not be fined.

Response: Staff's position is that the age of the encroachment is irrelevant. A similar argument can be made by a person speeding on the roads who says that he has driven over the speed limit for years and was never caught. Just because the violator was never caught does not excuse him from the law. In fact, in the case of encroachments, the owner has been enjoying the use of public lands without payment of any rent which could lead one to argue, the older the encroachment, the higher the fine.

Staff, however, feels that the amount of the fine should not be based on the age of the encroachment.

Size of Encroachment

The Board's request to staff to examine criteria for the imposing of fines arose from a situation where staff had stated the encroachment appeared to be due to "survey error." Although staff inquired with DAGS Survey Division as to whether they would be able to make such a determination, they responded that they would not feel comfortable making such statements.

Staff then looked at how encroachments are handled on private lands. Under Section 669-12, HRS, a de minimis structure position discrepancy on private lands shall not be considered as an encroachment or zoning violation. Section 669-11, HRS, defines such discrepancy as, for conservation property, 1.5 feet between the location of an improvement legally constructed along what was reasonably believed to be the boundary line and the actual location of the boundary line based on the most recent survey. Further, different limits of de minimis structure are provided in Section 669-12, e.g. 0.5 feet in a residential zone. However, Section 669-13 stipulates that this part of the law shall not apply on any public lands, and staff notes that we are only referring to the de minimis rule for the purpose of setting criteria for fines for encroachments.

Response: Anyone who encroaches onto State lands will have to either remove the encroachment or obtain an easement from the State as there is no de minimis rule for public lands. Staff would reiterate that the subject submittal is only for imposing of fines. Any applicant, subject to the Board's approval, who is exempted from paying a fine on the encroachment, will still have to obtain an easement from the Board.

Staff has come across some minor encroachments in terms of area. In these cases, the owners appeared to have acted in good faith to ensure the structure was built within their property lines by hiring a licensed surveyor. However, staff believes that the equipment and technology used in the old days may be one of the reasons why a small encroachment occurred. Therefore, staff thinks we should establish some figures to deal with these relatively minor encroachments.

To use the shoreline encroachment as an illustration, if we assume 50 feet is the average distance of the property line abutting the shoreline, a 1.5 feet (1.5 feet is considered a de minimis structure in conservation district) encroachment will